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In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC. *et al.*,

Petitioners,

v.

HOECHST-CELANESE CORP., formerly known as CELANESE CORP. *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under a RICO "scheme to defraud," is reliance and inducement or target status necessary – not merely sufficient – to establish "proximate cause" between "violation" and "injury"?

PARTIES TO THE PROCEEDINGS

Petitioners

Summit Properties, Inc.

Summit Properties Limited Partnership

Summit Properties Partnership Limited Partnership

StonyPoint/Summit Limited Partnership

Mcgregor/Mcguire Limited Partnership

Henderson/Mcguire Partners Limited Partnership

Oak Ridge/Mcguire Partners Limited Partnership

Waverly Place/Summit Partners Limited Partnership

Respondents

E.I. DuPont De Nemours & Co.

Bow Industrial Corp.

Shell Oil Co. d/b/a Shell Chemical Co.

Household International, Inc.

Hoescht-Celanese Corp. f/k/a Celanese Corporation

Hoescht Corporation

Vanguard Plastics, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. CONFLICTING WITH SIX CIRCUIT COURTS OF APPEAL THAT PROPERLY FOLLOW *HOLMES V. SECURITIES INVESTOR PROTECTION CORP.*, 503 U.S. 258 (1992), THE FIFTH CIRCUIT'S HOLDING – THAT TO ESTABLISH PROXIMATE CAUSE FOR A RICO SCHEME TO DEFRAUD, THE PLAINTIFF MUST NECESSARILY SHOW RELIANCE AND INDUCEMENT OR TARGET STATUS BETWEEN VIOLATION AND INJURY – REQUIRES REVIEW TO SETTLE A RECURRING LEGAL QUESTION IN NATION-WIDE LITIGATION UNDER AN IMPORTANT FEDERAL STATUTE THAT GUARANTEES INTEGRITY IN THE NATION'S MARKETPLACE	6
A Overview Of Argument	6
B. The Fifth Circuit's Decision Squarely Conflicts With Decisions Of The Second, Third, Fourth, Eighth, Eleventh, and District Of Columbia Circuits That Properly Follow *Holmes*	8

TABLE OF CONTENTS – Continued

Page

(1) Third Circuit Conflicts 8

(2) Eighth Circuit Conflicts 9

(3) Eleventh Circuit Conflicts 11

(4) Second Circuit Conflicts 13

(5) Fourth Circuit Conflicts 14

(6) Target Status: Conflict with the District of Columbia Circuit 17

(7) "Scheme to Defraud" 21

C. The Fifth Circuit's Decision Is Consistent With Decisions Of The Sixth And Seventh Circuits 23

II. CONTAINING A DUAL CRIMINAL AND CIVIL ENFORCEMENT MECHANISM, RICO REFLECTS CONGRESS' CONSIDERED JUDGMENT HOW ENTERPRISE CRIMINALITY SHOULD BE TREATED; THE FIFTH CIRCUIT'S PROXIMATE CAUSE TEST, IN CONFLICT WITH OTHER CIRCUITS, UNDERMINES RICO'S FAIRNESS AND EFFECTIVENESS IN THE NATION'S MARKETPLACE 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 24, 27

Ahmad v. Rosenblatt, 118 F.3d 886 (1st Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998) 25

All Care Nursing Service v. High Tech Staffing, 135 F.3d 740 (11th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999) 12

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 23

American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) 26

Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) 25

Appletree Square v. W. R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) 10, 11

Associated General Contractors of Cal., Inc. v. Cal. State Counsel of Carpenters, 459 U.S. 519 (1983) 14, 19

Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989) 9, 11, 22

BCCI (Luxembourg), S.A. v. Khalil, 214 F.3d 168 (D.C. Cir. 2000) 17

Bieter Co. v. Blomquist, 987 F.2d 1319 (8th Cir.), *cert. denied*, 510 U.S. 823 (1993) 10, 11, 14, 15

Blue Shield of VA v. McCready, 457 U.S. 465 (1982) 14, 26

Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936) 17

California v. ARC American Corp., 490 U.S. 93 (1989) 19

TABLE OF AUTHORITIES – Continued

Page

Carpenter v. United States, 484 U.S. 19 (1987)..... 22

Cement Contractors Workers District Council Welfare Fund v. Lollo, 148 F.3d 194 (2nd Cir. 1998) 13

Central Distributors of Beer, Inc. v. Conn., 5 F.3d 181 (6th Cir. 1993), *cert. denied*, 512 U.S. 1207 (1994) 24

Chisolm v. TransSouth Fin. Corp., 95 F.3d 331 (4th Cir. 1996) 15, 16

City of Milwaukee v. Illinois, 451 U.S. 304 (1981)..... 29

County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295 (2nd Cir. 1999) 13, 14

Cox v. Administrator for United States Steel & Carnegie, 17 F.3d 1386 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347, *cert. denied*, 510 U.S. 1110 (1995)..... 12

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990)..... 8, 9, 10, 11, 14, 15

Fasulo v. United States, 272 U.S. 620 (1926) 22

Flowers v. Continental Grain Co., 775 F.2d 1051 (8th Cir. 1985) 10

H.J. Inc. v. Northwestern Bell Telephone Co., Inc., 492 U.S. 229 (1988) 3, 25

Haroco, Inc. v. Am. Nat'l Bk. & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) 29

Hawaii v. Standard Oil of CA, 405 U.S. 251 (1972) 20

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Iannelli v. United States, 420 U.S. 770 (1975) 29

Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737 (3rd Cir. 1996) 9

Ifill v. West, 1999 U.S. Dist. Lexis 21320 *32-*35 - (E.D. N.Y. Sept. 1, 1999) 13

In re EDC, Inc., 930 F.2d 1275 (7th Cir. 1991) 16

Insolia v. Phillip Morris, Inc., 216 F.3d 596 (9th Cir. 2000) 23

John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc., 653 F. Supp. 1242 (E.D. Va. 1987), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987) 14

Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290 (11th Cir. 1998) 12

Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990) 19

Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) 3

Marriot Bros. v. Gage, 911 F.2d 1105 (5th Cir. 1990) 3

Metromedia Co. v. Fugazy, 983 F.2d 350 (2nd Cir. 1992), *cert. denied*, 508 U.S. 952 (1993) 13

Mid Atlantic Telecon, Inc. v. Long Distance Servs., Inc., 18 F.3d 260 (4th Cir.), *cert. denied*, 513 U.S. 913 (1994) 16

Minnesota Mining & Mfg. Co., v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) 25

Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1050 (1915) 17

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 29

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 29

TABLE OF AUTHORITIES – Continued

Page

Morley v. Cohen, 888 F.2d 1006 (4th Cir. 1989) 20

Murr Plumbing Co. Inc. v. Sherer Bros. Financial Services, Co., 48 F.3d 1066 (8th Cir. 1995)..... 22

N.O.W. v. Scheidler, 510 U.S. 249 (1994).....3, 25

Neder v. United States, 527 U.S. 1 (1999)..... 22

New York Trust Co. v. Eisner, 256 U.S. 345 (1921)..... 18

Newton v. Tyson Foods, Inc., 207 F.3d 444 (8th Cir. 2000)..... 11

Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991)..... 12

Pereira v. United States, 347 U.S. 1 (1954)..... 16

Perma Life Mufflers, Inc., v. Int'l Parts Corp., 392 U.S. 134 (1968) 27

Pfizer Inc. v. India, 434 U.S. 308 (1978) 26

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 25, 26

Reynolds v. East Dyer Dev. Co., 882 F.2d 1249 (7th Cir. 1989) 23

Rotella v. Wood, 528 U.S. 549 (2000) 26

Scott v. Prudential Securities, Inc., 141 F.3d 1007 (11th Cir. 1998)..... 12

Sedima S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1984)..... 26

Shaw v. Rolex Watch U.S.A., Inc., 726 F. Supp. 969 (S.D. N.Y. 1989) 13

Standbred Owners Ass'n v. Roosevelt Raceway Associates, 985 F.2d 102 (2nd Cir. 1993) 14

TABLE OF AUTHORITIES – Continued

Page

Taffet v. Southern Co., 930 F.2d 847 (11th Cir. 1991), *rev'd on other grounds*, 958 F.2d 1514 (11th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992) 11, 12, 13, 14

Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920), *cert. denied*, 254 U.S. 643 (1920) 19, 30

Tel-Phonic Services, Inc., v. TBS Int'l, Inc., 975 F.2d 1134 (5th Cir. 1992)..... 28

Town of West Hartford v. Operation Rescue, 915 F.2d 92 (2nd Cir. 1990) 19

UnitedHealth Care Corp. v. Am. Trade Ins. Co., Ltd. et al., 88 F.3d 563 (8th Cir. 1996) 10, 11, 22

United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984)..... 24

United States v. Turkette, 452 U.S. 576 (1981).....24, 29

ARTICLES

G. Robert Blakey, *et al., Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding & Abetting and Conspiracy Liability under RICO*, 33 AM. CRIM. L. REV. 1345 (1995) 8, 21, 22, 29

G. Robert Blakey, *et al., Myths That Bolster Efforts to Rewrite RICO*, 43 VAND. L. REV. 851 (1990) 27

Michael Block, *et al., The Deterrent Effect of Antitrust Enforcement*, 89 JOURNAL OF POL. ECONOMY 429 (1981)..... 26

Courtney Chetty Genco, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333 (1992)..... 21

William Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1964)..... 28

TABLE OF AUTHORITIES – Continued

Page

BOOKS

CARL KAYSEN, *et al.*, ANTITRUST POLICY (1959) 27

WILLIAM PROSSER, *et al.*, LAW OF TORTS (5th ed. 1984) 21

CASS SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICTS (1993) 19

UNITED STATES DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS (1981) 27

CONSTITUTIONS, STATUTES, AND OTHER AUTHORITIES

18 U.S.C. § 1341 .....2, 16

18 U.S.C. § 1343 2

18 U.S.C. §§ 1961 *et seq* 1, 2, 8, 24, 25, 29

18 U.S.C. § 1965 27

84 Stat. 922 8

84 Stat. 923 28

84 Stat. 941 8

84 Stat. 947 .....26, 29

Fed. R. Civ. Pro. 12(G)(6) 5

Fed. R. Civ. Pro. 50(e) 5

RESTATEMENT OF TORTS (Second) § 774B (1979) 17

Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm., 100th Cong. 2nd Sess. (1988) 21

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 7, 2000.

OPINIONS BELOW

The decisions of the United States District Court for the Southern District of Texas are unreported and reprinted in the Appendix to this Petition. (App. 20a and 28a)

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 214 F.3d 556 and is reprinted in the Appendix to this Petition. (App. 1a-12a)

The Order of the United States Court of Appeals for the Fifth Circuit denying the petition for rehearing and for rehearing en banc is reprinted in the Appendix to this Petition. (App. 82a-83a)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 7, 2000. Petitioners' timely petition for rehearing and petition for rehearing en banc was denied on July 27, 2000. (App. 82a-83a)

STATUTORY PROVISIONS

18 U.S.C. § 1964(c), in relevant part, provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost

of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1962(c), in relevant part, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

18 U.S.C. § 1961, in relevant part, provides:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, . . . United States Code section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

18 U.S.C. § 1341, in relevant part, provides:

> Whoever having devised . . . any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any post office . . . any matter . . . to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned. . . .

18 U.S.C. § 1343, in relevant part, provides:

> Whoever, having devised . . . any scheme to defraud . . . transmits by means of wire communication in interstate or foreign commerce, any- . . . signals . . . for the purpose of executing such scheme . . . shall be fined . . . or imprisoned. . . .

STATEMENT OF THE CASE

This Petition presents a single question: Under a RICO "scheme to defraud," is reliance and inducement or target status – not merely sufficient – but necessary to establish "proximate cause" between "violation" and "injury"?

The Fifth Circuit says "yes." The Sixth and Seventh Circuits agree. The Second, Third, Fourth, Eighth, Eleventh, and District of Columbia Circuits say "no." The resolution of this square conflict is required to settle a recurring legal question in nation-wide litigation under an important Federal statute that guarantees integrity in the Nation's marketplace. This Petition presents this Court with an apt vehicle to settle this conflict.

Petitioners are property owners that suffered damages as a result of defective Polybutylene ("PB") pipes and acetal plastic fittings in hot-and-cold water plumbing systems. (App. 79a) Respondents are manufacturers that marketed PB pipes and acetal fittings for use in plumbing systems through a complex "scheme to defraud." Petitioners seek to recover from Respondents the damages caused to their businesses and properties when the PB pipes and acetal fittings in their systems failed. (App. 79a)[1]

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[1] This statement of facts is based on the Second Amended Complaint and the RICO Case Statement. Petitioners' allegations must be accepted as true on a motion to dismiss. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). The RICO Case Statement is part of the Petitioners' Complaint. *Marriott Bros. v. Gage*, 911 F.2d 1105, 1108 (5th Cir. 1990). Dismissal of a complaint is only proper if it is "clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *H.J. Inc. v. Northwestern Bell Telephone Co., Inc.*, 492 U.S. 229, 249-50 (1988) (RICO). General allegations "are presum[ed] to embrace those specific facts necessary to support the claims." *N.O.W. v. Scheidler*, 510 U.S. 249, 256 (1994) (RICO). The Complaint and RICO Case Statement amplify in rich detail Petitioners' basic allegations; they constitute, therefore, an excellent factual record – *legally* not in dispute – on which the circuit court conflict identified by this Petition may be appropriately resolved by this Court.

PB is a by-product of the oil refining process. (App. 52a) Respondent Shell Oil Company ("Shell") purchased an exclusive 10-year right to sell PB in the United States in the 1970's. (App. 52a) Shell then sold PB resin pellets to the Respondents Bow, Vanguard, and Household's subsidiary that extruded the pellets into plastic pipe. (App. 52a) Respondents Celanese and DuPont sold acetal resins that were used by the manufacturers to mold fittings for the systems. (App. 53a)

Shell orchestrated a complex "scheme to defraud" between itself and the other Respondents designed to convince the construction industry and – significantly, its standard-setting bodies – that the use of PB pipes and acetal fittings in plumbing systems would be suitable for those systems and that they were superior to, and less expensive than, copper pipes, the use of which then dominated the market. (App. 55a) The scheme was a fraud on the market. (App. 52a) Respondents marketed PB pipes and acetal fittings across the country to code bodies, builders, developers, plumbing distributors, and other users of plumbing parts. (App. 52a, 57a-58a) Their objective was to create an enormous demand for PB pipe and acetal fittings by making them "the material of choice" instead of copper for residential and commercial plumbing systems. (App. 57a).[2] Among other things, the Respondents represented that PB pipes and acetal fittings: (1) were suitable for use in a potable water plumbing system; (2) would last at least 50 years; (3) would not corrode and even the most aggressive water would not attack it; (4) was easy, reliable, simple, proven and fast to

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[2] That objective is revealed in Shell's Marketing Plan, which is reprinted in full in App. 85a-101a.

install; and (5) would not occasion serious service problems. (App. 59a-60a) These representations were knowingly false. (App. 60a). In fact, scientists within the companies of the Respondents specifically advised their superiors that the PB and acetal resins were not suitable for water systems because they would degrade when exposed to chlorinated water. (App. 61a) Hope for increased profits by the marketing arms of the Respondents prevailed over these scientific objections. *(Id.)*

The District Court granted Respondents' Motions to Dismiss Petitioners' claim for relief for a RICO "scheme to defraud" under Fed. R. Civ. Pro. 12(b)(6) for two reasons: (1) false representations and omissions were not made to Petitioners, and (2) they were not relied upon by Petitioners. (App. 24a-25a) Petitioners filed a Motion to Alter or Amend Judgment and for Reconsideration under Fed. R. Civ. P. 59(e). The District Court denied the Motions, finding, without an analysis of the relevant factors, that Petitioners' injuries were also "indirect" under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). (App. 15a)

The Fifth Circuit affirmed. It phrased the question as "whether a plaintiff's reliance on the predicate mail or wire fraud is *necessary* in order to establish causation." (214 F.3d at 558; App. 4a) (emphasis added) Commenting that "[m]ost other circuits . . . require a showing of detrimental reliance by the plaintiff," and that reliance on "representations by various entities who stated the plaintiffs' properties conformed to local building codes" was "not reliance upon representations *by defendants*," the Circuit affirmed the decisions of the District Court. (*Id.* at 559 n.15; 560; App. 7a, 12a) (emphasis added). For the Circuit, the "fraud . . . [must] *induce* the purchase transactions." (*Id.*; App. 7a) (emphasis added) "[A] plaintiff" [must be] . . . the *target* of . . . [the] fraud or . . . *rel[y]*

upon the fraudulent conduct *of the defendants.*" (*Id.* at 561; App. at 10a) (emphasis added). "Defendants' competitors might recover for competitive . . . [injury] but . . . [as] these *particular* plaintiffs were [not] the *targets* of a scheme to defraud accomplished *by defrauding others,*" they could not recover for their injuries. (*Id.* and n.22; App. 10a) (emphasis added)

Rehearing and rehearing en banc were denied on July 27, 2000. (App. 82a).

REASONS FOR GRANTING THE WRIT

I. CONFLICTING WITH SIX COURTS OF APPEAL THAT PROPERLY FOLLOW *HOLMES V. SECURITIES INVESTOR PROTECTION CORP.*, 503 U.S. 258 (1992), THE FIFTH CIRCUIT'S HOLDING – THAT TO ESTABLISH PROXIMATE CAUSE FOR A RICO SCHEME TO DEFRAUD, THE PLAINTIFF MUST NECESSARILY SHOW RELIANCE AND INDUCEMENT OR TARGET STATUS – REQUIRES REVIEW TO SETTLE A RECURRING LEGAL QUESTION IN NATION-WIDE LITIGATION UNDER AN IMPORTANT FEDERAL STATUTE THAT GUARANTEES INTEGRITY IN THE NATION'S MARKETPLACE.

A. Overview of Argument.

The Fifth Circuit's decision is sharply at odds with the majority view. Its test for "proximate cause" in a RICO "scheme to defraud" – "reliance and inducement or target status" – is echoed by the Seventh Circuit precedent, is consistent with Sixth Circuit precedent, but it is in square conflict with decisions of the Second, Third, Fourth, Eighth, Eleventh, and District of Columbia Circuits. It also fundamentally misperceives *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which is properly followed by the majority view. *Holmes* establishes for RICO a three factor test to distinguish "direct"

and "indirect" injuries. It does not require "reliance and inducement" for the nexus between "violation" and "injury" or "target," a label, for "direct or indirect," that is, "remoteness." Contrary to the majority view, the Fifth Circuit conflates "scheme to defraud" under Federal law with common law crimes and torts that did – and did not – contain misrepresentation and reliance elements. Similarly, in reading "by reason of" – which under *Holmes* incorporates "proximate cause" concepts – to require, *necessarily*, inducement and reliance by the victim or that the victim be a specific "target" of the "scheme to defraud," the Fifth Circuit continues a fracture in the circuits by fusing two independent aspects of "proximate cause": nexus between "violation" and "injury," and the relationship of "near" and "remote" between a range of RICO victims. Reliance and inducement may be *sufficient* to establish proximate cause; they are not *necessary* to establish it. "Target" is a label that this Court shuns, as the other circuits rightly realize.

RICO establishes a dual criminal and civil system of enforcement of the Federal fraud predicates based on "scheme to defraud." Criminally, they are enforced without requiring a showing of success, but if the scheme is successful, forfeiture of property may be imposed. Civilly, they are enforced through Governmental and private suits. If the scheme is successful, the Government may seek the disgorgement of illicit profits; the victim of the scheme may seek treble damages and counsel fees for injury to business or property "by reason of" the scheme. The Fifth Circuit's opinion threatens to undermine this dual enforcement mechanism, which requires uniformity in criminal and civil litigation. Uniformity is also required to avoid forum shopping and unjustifiably divergent legal outcomes that are not fair to litigants and undermine the effectiveness of the statute. Review of the

Fifth Circuit's decision is required to resolve a recurring legal question in nation-wide litigation under an important Federal statute that guarantees integrity in the Nation's marketplace. This Petition presents this Court with an apt vehicle to settle this conflict between the circuits. Certiorari should be granted, therefore, to resolve an intolerable conflict that should not be allowed to fester further.

B. The Fifth Circuit's Decision Squarely Conflicts With Decisions Of The Second, Third, Fourth, Eighth, Eleventh, And District of Columbia Circuits That Properly Follow *Holmes*.

While the Fifth Circuit cites other circuit courts of appeal decisions to support its "reliance and inducement or target" rule under RICO,[3] those decisions, in fact, do not. (214 F.3d at 560 n.16; App. 7a) (collecting, in chronological order, decisions from the 3rd, 4th, 8th, 6th, 11th, 2nd and 7th circuits).

(1) Third Circuit Conflicts.

In *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1055 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990), the Third Circuit properly required, in a RICO "scheme to defraud," neither misrepresentation to, reliance by, inducement of, nor target status by the victim. The defendants bribed Nigerian government officials to win a defense contract. The mailings implementing the

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[3] Public L. No. 91-452, tit. ix, 84 Stat. 922, 941 (1970) (codified at 18 U.S.C. § 1961 *et seq.*) The civil provisions of RICO are found in 18 U.S.C. §§ 1964, 1965. *See* G. Robert Blakey, *et al.*, *Reflections on Reves v. Ernst & Young*, 33 AM. CRIM. L. REV. 1345, 1346 n.3 (1995) (collecting the best of a range of analyses of RICO) (hereinafter "Reflections").

fraud were sent to the Nigerian government, not the plaintiffs; it was the "target" of the fraud, not the plaintiffs. Nonetheless, the Third Circuit squarely held that "the plaintiff's complaint of injury from the bribery scheme . . . meet[s] [the proximate cause] standard" of RICO. 847 F.2d at 1067. Indeed, the Third Circuit appropriately applied the *same* standard of "proximate cause" to antitrust *and* RICO.[4]

The Fifth Circuit cites *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3rd Cir. 1996), as supporting its "reliance and inducement or target" rule, but *Ideal* is a simple, two-party representation case, where lack of reliance can establish lack of "proximate cause"; in fact, the plaintiff in *Ideal* "knew it was being overcharged for purchases almost from the start." *Id.* at 746. No nexus – proximate or otherwise – existed between the "alleged" representations and the "alleged" injury. *Ideal* is not, as here, or in *Environmental Tectonics*, a complex, multiparty "scheme to defraud" that extends substantially beyond simple misrepresentations in a face-to-face transaction. Here, as in *Environmental Tectonics*, but not in *Ideal*, "proximate cause" can be established in an alternative fashion fully consistent with general standards of "proximate cause." *Ideal Dairy* is, therefore, inapposite.

(2) Eighth Circuit Conflicts.

Nor does the Eighth Circuit support the Fifth Circuit's blanket rule. In *Atlas Pile Driving Co. v. DiCon Fin.*

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[4] *See infra* nn.7 and 17 for discussions of "proximate cause" under antitrust. No antitrust decision, of course, holds that "proximate cause" under the antitrust statutes requires reliance and inducement; this Court eschews, too, the use of the "target" label in antitrust.

Co., 886 F.2d 986 (8th Cir. 1989), the plaintiffs were subcontractors at a home building site who were not paid for their work. The general contractor was a strawman who borrowed funds from the seller and a finance company, paid himself richly for small amounts of work, and then defaulted on the loans. At trial, where the property seller and lender were defendants, the common law fraud claims were *dismissed* for a lack of necessary elements (misrepresentation, etc.). 886 F.2d at 991. Plaintiffs succeeded, however, in proving their RICO claims, which were premised on a "scheme to defraud" arising out of the foreclosure notices mailed by the lender. The foreclosure notices were not inaccurate, and they did not induce reliance on the part of the subcontractors who received them. The Eighth Circuit follows a "reliance requirement" in simple, two-party representation cases. *See, e.g., Flowers v. Continental Grain Co.*, 775 F.2d 1051, 1054 (8th Cir. 1985). Nevertheless, the Eighth Circuit in *Atlas* properly affirmed a judgment under civil RICO where defendants engaged in a complex, multiparty "scheme to defraud" that entailed neither mailed misrepresentations, reliance, nor inducement.

The Fifth Circuit cites *Appletree Square v. W. R. Grace & Co.*, 29 F.3d 1283, 1285-86 (8th Cir. 1994), as supporting its blanket rule, which, in fact, it does. *Appletree Square*, however, is an anomaly in the Eighth Circuit. In fact, *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 n.4 (8th Cir. 1993) and *UnitedHealth Care Corp. v. Am. Trade Ins. Co. Ltd., et al.*, 88 F.3d 563 (8th Cir. 1996) are far more typical examples of Eighth Circuit law on "proximate cause" under RICO. In *Bieter*, a commercial developer lost a zoning battle through bribery that was part of a complex "scheme to defraud," as in *Environmental Tectonics*. The District Court dismissed the complaint because of lack of "proximate cause" and injury to "property." Properly

applying the three *Holmes* factors to distinguish between "near" and "remote" RICO claimants – which *Appletree Square* did not – the Eighth Circuit reversed and found that "proximate cause" was a matter of fact for the jury. 987 F.2d at 1326-28. It held, too, that the District Court's view of "property" – taken from regulatory law, that is, losing a zoning variance is not a "taking" of "property" – was flawed. 987 F.2d at 1327 (citing *Environmental Tectonics*). In sum, it held that the District Court adopted an "excessively narrow view of causation and injury," 987 F.2d at 1320, that "would not be consistent with purposes of RICO," to wit, "to root out public corruption." *Id.* at 1329. Similarly, in *UnitedHealth Care Corp.*, insurance premiums were misappropriated through a complex, multi-party "scheme to defraud" a series of insureds; neither misrepresentation, reliance, inducement, nor target status was required to establish "proximate cause." 88 F.3d at 571 n.5 and 572. The Fifth Circuit's blanket rule is at odds with *Atlas, Bieter,* and *UnitedHealth Care Corp.*[5]

(3) Eleventh Circuit Conflicts.

In *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *rev'd on other grounds*, 958 F.2d 1514 (11th Cir. 1992), the Eleventh Circuit did not follow a blanket "reliance and inducement or target" rule. There, utilities hatched a complex "scheme to defraud" that required a dual accounting system designed to mislead both the Internal Revenue Service and the Public Service Commission by

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[5] *Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 446-47 (8th Cir. 2000) is hard to classify. There, cattle producers alleged injuries suffered when Tyson made illegal payments to exempt the poultry industry from Department of Agriculture regulations. The producers were properly held to be too remote under the *Holmes* factors, but "target" and "zone of interests" labels were also strangely employed.

understating the utilities' income. The plaintiff rate-payers were then forced to pay higher rates because of the "scheme to defraud." The "fraud [was] upon the state agency." *Id.* at 857. The plaintiff rate-payers did not receive the misrepresentations, did not rely on them, took no action induced by the fraud, and were not its target. In fact, in simple, two-party misrepresentation cases the Eleventh Circuit, like the Eighth Circuit, follows a "reliance" requirement. *See, e.g., Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991), properly cited by the Fifth Circuit. (214 F.3d at 560 n.16; App. 7a). Nevertheless, in *Taffet*, the Eleventh Circuit squarely held that the plaintiff rate-payers stated a "tangible, cognizable RICO injury." 930 F.2d at 857. *Accord All Care Nursing Service v. High Tech Staffing*, 135 F.3d 740, 745 n.10 (11th Cir. 1998) (complex RICO "scheme to defraud"; injury shown – expressly – without "reliance"); *Cox v. Administrator for United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (complex RICO bribery scheme; "proximate cause" shown without reliance, inducement, or target status; question resolved by general "proximate cause" standards), *modified on other grounds*, 30 F.3d 1347, *cert. denied*, 510 U.S. 1110 (1995). Any fair description of the "rule" followed in the Eleventh Circuit must, therefore, include *Taffet*, *Cox*, and *All Care Nursing Service*, which the Fifth Circuit's opinion ignores and which are in square conflict with the adoption of a blanket rule.[6]

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[6] The Fifth Circuit's decision is in accord with *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (cited at 214 F.2d at 560 n.20; App. 9a); *Johnson*, however, merely cites the "target" language of *Pellitier*; it does not distinguish *All Care*, *Cox* or *Taffet*; *Johnson* is an aberration, a misapplication of *Pellitier*; it cannot represent the law of the Circuit since a panel may not overrule a prior panel without going en banc. *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1015 n.16 (11th Cir. 1998).

(4) Second Circuit Conflicts.

In *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311-12 (2nd Cir. 1999), properly cited by the Fifth Circuit (214 F.3d at 560 n.16; App. 7a), the Second Circuit, moreover, reached a result fully consistent with *Taffet*, even though in *Suffolk* the commission did *not* rely on the misrepresentations, as in *Taffet* it did. In *Suffolk*, the Second Circuit held that the *absence* in the record of proof that the rate-setting commission relied on the misrepresentations by the utilities precluded the rate-payers from establishing that the misrepresentations were the "proximate cause" of their higher rates; it did *not* require, however, that the misrepresentations be made to the rate-payers or that the rate-payers be a "target" of the fraud. Had the rate-setting commission, in fact, relied on the misrepresentations, the outcome would have been different. *Accord Ifill v. West*, 1999 U.S. Dist. Lexis 21320 *32-*35 (S.D.N.Y. Sept. 1, 1999) (RICO "scheme to defraud"; personal reliance not required; element may be met by third party reliance; decisions collected). In simple, two-party misrepresentation cases, involving a face-to-face transaction, the Second Circuit applies a "reliance" element *to establish* proximate cause. *See, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2nd Cir. 1992) (RICO). Yet the Second Circuit also unequivocally recognizes that RICO is different from common law fraud. *See, e.g., Cement Contractors Workers District Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2nd Cir. 1998) (distinguishing New York fraud law that requires that the misrepresentations be to the person who relies on them from RICO, where "proximate cause" may be established by third party reliance, and citing favorably *Shaw v. Rolex Watch, U.S.A.*, 726 F. Supp. 969, 973 (S.D. N.Y. 1989) (false statement made to Customs official; parties injured by unauthorized importation of watches state claim for RICO "scheme to

defraud")). *See also Standbred Owners Ass'n v. Roosevelt Raceway Associates*, 985 F.2d 102, 163-65 (2nd Cir. 1993) (RICO "scheme to defraud"; under *Holmes*, misrepresentations to bond authority actionable by third parties that made expenditures in reliance on them). Plainly, these Second Circuit decisions are in conflict with the Fifth Circuit's blanket rule.[7]

(5) Fourth Circuit Conflicts.

In *John C. Holland Enter., Inc. v. J.P. Mascaro & Sons, Inc.*, 653 F. Supp. 1242 (E.D. Va. 1987), *aff'd without opinion*, 829 F.2d 1120 (4th Cir. 1987), the Fourth Circuit upheld a RICO claim closely analogous to *Environmental Tectonics* and *Bieter*, but squarely in conflict with the Fifth Circuit's blanket rule. There, the defendant successfully bid on a contract falsely claiming to be a small business. The plaintiff, a disappointed bidder, sued for common law fraud and RICO "consisting of multiple acts of mail and wire fraud." 653 F. Supp. at 1249. The District Court

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[7] *Taffet*, not mentioned by the Fifth Circuit, and *Suffolk*, cited for the wrong position, are particularly significant. This Court in *Holmes* cited *these* cases as illustrative of circumstances where, in fact, "proximate cause" "might" be established. *Holmes*, 503 U.S. at 272 n.19. Vainly, the Fifth Circuit sought to distinguish this reference in *Holmes* by noting a difference, *not given significance in Holmes*, that is, "direct and contemporaneous" rather than "later" and "untainted." (214 F.3d at 561 n.11; App. 10a-11a). In fact, "intent" alone is *not* sufficient to establish "proximate cause" under antitrust law on which the *Holmes* standard was modeled. *Holmes*, 503 U.S. at 267. "Negligence," when other factors are present, *is* sufficient to establish "proximate cause" under antitrust law. *See Associated General Contractors of CA v. CA Council of Carpenters*, 459 U.S. 519, 535 (1983) (antitrust) (intent "not a panacea") ("AGC"); *Blue Shield of VA v. McCready*, 457 U.S. 465, 478-79 (1982) (antitrust) (negligence with other factors sufficient).

dismissed the common law fraud claim because the Government, not the plaintiff, relied on the defendant's false certification; it refused to dismiss the RICO claim because the "proximate cause" requirements of a "scheme to defraud" were different than the "proximate cause" requirements of common law fraud. *Id.* Like *Environmental Tectoni* the Third Circuit and *Bieter* in the Eighth Circuit, *Holland* in the Fourth Circuit cannot be squared with the Fifth Circuit's blanket rule.

The Fifth Circuit also cites *Chisolm v. TransSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996), as among the decisions supporting its "reliance, inducement or target" rule. (214 F.3d at 560 n.16; App. at 7a) In fact, *Chisolm* is squarely in conflict with the Fifth Circuit's decision – on closely analogous facts. In *Chisolm*, plaintiffs were the victims of a used car churning "scheme to defraud," in which people of low income were sold financed cars at inflated prices that they could not afford; when they inevitably defaulted, the cars were repossessed by agents of the finance company, and they were sold at a fraudulent auction back to the used car dealer for resale to new victims. The victims were sent a "Notice of Private Sale," which was, as here, "technically accurate." Following *Holmes*, the Fourth Circuit held that a "proximate cause" relation had to be established between "the violation" and "the injury," which, in turn, usually required "detrimental reliance." 95 F.3d at 336. The District Court had dismissed the civil RICO claim without leave to amend because it thought that plaintiffs did not rely on TransSouth's Notice of Private Sale because, even if they had been told the full truth (it was a sham), they were not in a position to redeem the cars. The magistrate judge, whose report recommending dismissal the District Court adopted, observed:

> Plaintiffs' "reliance" argument amounts to no more than a general complaint that Trans South

> participated in a massive fraud, an illegal and profitable scam, that took advantage of the innocent plaintiffs' reliance *on the apparent legitimacy and legality of the operation.*

95 F.3d at 338 (emphasis added). The Fourth Circuit, however, squarely held that "reliance on the apparent legitimacy and legality of the operation" *was* sufficient. *Id.* ("We could scarcely say it more clearly.") The Fifth Circuit's decision that reliance on the notices given to the Petitioners that their properties conformed to the local building codes was *insufficient* follows the *rejected* report of the magistrate, *not* the decision of the Court of Appeals.[8] The Fifth Circuit's decision is in flat contradiction with *Chisolm*.[9]

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[8] That the mailings here were sent by innocent third parties, not a participant in the scheme to defraud, is insignificant. Mail fraud may be violated by "causing" the matter to be mailed. 18 U.S.C. § 1341 ("places . . . or causes to be deposited"); *Pereira v. United States*, 347 U.S. 1, 8 (1954). The Fifth Circuit ignores this well-established principle when it holds that the representations made by third parties to Petitioners that their properties were in compliance with code standards could not be attributed to Respondents' conduct. (24 F.3d at 559 n.15; App. 7a) It could, if the Respondents "caused" them to be made, as they did.

[9] Other decisions in conflict with the Fifth Circuit's blanket rule abound. *See, e.g., Mid Atlantic Telecon, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994) (RICO) (long distance competitor may sue, consistent with *Holmes*, under RICO for injury (lost customers and lost revenue) worked by fraud on purchasers induced to buy service at "low prices" that were, in fact, fraudulent); *In re EDC, Inc.*, 530 F.2d 1279 (7th Cir. 1991) (purchaser of insolvent company may sue where purchase was facilitated by scam on Pension Benefit Guaranty Corporation).

Mid Atlantic Telecon and *In re EDC* are vainly distinguished by the Fifth Circuit, (214 F.3d at 560 n.21 and 22; App. 10a), as

(6) Target Status: Conflict With the District of Columbia Circuit.

The Fifth Circuit's holding that reliance and inducement were necessary – not merely sufficient – to establish "proximate cause" was qualified; it framed its blanket rule as "reliance and inducement" *or* "target." (214 F.3d at 560; App. 10a) The so-called "target wing" of the Fifth Circuit's blanket rule, however, reverts to the discredited "label approach" to resolve remoteness under "proximate cause." It is in square conflict with the decisions of the Second, Third, Fourth, Eighth, and Eleventh Circuits, fully discussed, *supra*. It is also squarely rejected by the District of Columbia Circuit Court of Appeals in *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168, 174 (D.C.Cir. 2000) (RICO scheme to defraud) ("[*Holmes*] never suggests . . . that the *only* or best way to prove proximate cause is for a plaintiff to prove he was the 'intended target' . . . of the RICO activity. We . . . reject . . . [this] highly restrictive reading of RICO.") (emphasis added).

It remains now only to explicate briefly the correct approach, which is followed by the other circuits, based

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involving the "target wing" of "proximate cause," to be discussed, *infra*, as involving a "high and foreseeable risk" that is the equivalent of "deliberate" conduct, which the Fifth Circuit frankly acknowledges as an exception to its blanket rule.

In fact, even the common law did not follow a blanket rule of reliance and inducement or target for common law fraud. *See, e.g., Bohannon v. Wachovia Bank & Trust Co.*, 210 N.C. 679, 188 S.E. 390 (1936) (testator deceived into disinheriting plaintiff; plaintiff has a claim for relief); *accord* RESTATEMENT OF TORTS (Second) § 774B (1979); *Mitchell v. Langley*, 143 Ga. 827, 85 S.E. 1050 (1915) (holder of life insurance policy fraudulently induced to change beneficiary; beneficiary has a claim for relief).

on the teachings of this Court in *Holmes*. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). That history was reviewed in detail by this Court in *AGC*, 459 U.S. at 528-535. As a part of that review, this Court discussed and criticized the *labels* that lower courts used to administer "proximate cause" under the antitrust statutes: "directness," "zone of interests," and "target." *Id.* at 535 n.33. Because it specifically recognized that these labels lead to contradictory and inconsistent results under antitrust, which are also exemplified by this Petition under RICO, this Court *directed* lower courts, instead, to "analyze each situation in light of the [five antitrust] factors" that it identified in its opinion. *Id.* In *Holmes*, this Court reformulated the five *AGC* factors of the antitrust standard for "remoteness" into a three factor standard to fit RICO:[10] (1) the relative "difficult[y]" of "ascertain[ing]" the plaintiff's damage "attributable to the violation" between him and other more immediate victims, (2) the danger that recognizing the less immediate victim's claim would require the "adopt[ion of] complicated rules apportioning damages among plaintiffs removed at different levels of injury . . . to obviate the risk of multiple recoveries," and (3) the absence of a "need to grapple with the problems" because more immediate "victims . . . [could] be counted on to vindicate the law as private attorneys general. . . . " *Holmes*, 503 U.S. at 269-70 (citing *AGC*, 459 U.S. at 540-42). As in *AGC*, *Holmes* did not announce a "black letter" rule that would "dictate the result in every case," but reformulating the 19th century common law "direct or indirect" or "remoteness" rule – which was an analytical or formal "rule" – into a 20th

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[10] RICO does not have an "antitrust injury" analogue. *Holmes*, 503 U.S. at 259 n.15.

century "standard."[11] "Labels," which merely tagged outcomes without giving criteria for decision, were no longer to be used – ostensibly – to determine "remoteness."[12] Far from following *Holmes'* approach to the "remoteness" dimension of "proximate cause," the Fifth Circuit, therefore, reverted to the discredited *label* approach that is not followed by the other circuit courts and is squarely condemned in *AGC* for antitrust and *Holmes* for RICO.

When the proper *Holmes* approach is used, as it is by other circuits, only one conclusion is justifiable here: the "best," if not only, enforcers of RICO against this complex, multiparty "scheme to defraud" are the end-users like Petitioners. The purpose of the use of the *Holmes* factors is *to select* the best enforcer to bring a RICO suit among a range of its victims. *Holmes*, 503 U.S. at 269; *AGC*, 459 U.S. at 4542; *Kansas v. Utilicorp*, 497 U.S. 199, 214 (1990); *California v. ARC American Corp.*, 490 U.S. 93, 102 n.6 (1989) ("ARC"). No plaintiff's claim should be denied under a "remoteness" analysis when the denial is "likely to leave a significant violation [of Federal law] undetected or unremedied." *AGC*, 459 U.S. at 542. Certainly, the code bodies that approved the use of PB plumbing will not seek to sue under RICO, nor could they, because they themselves were not injured. *Cf. Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103-04

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[11] The distinction between a "rule" (drive 55 mph) and a "standard" (drive reasonably) is brought out in CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICTS 106-08, 110-15, 130-35 (1993).

[12] *See Techt v. Hughes*, 229 N.Y. 222, 244, 128 N.E. 185, 189 (1920) (Cardozo, J.) ("To determine whether . . . [a treaty] has . . . [a] character it is not enough to consider its . . . label. No general formula suffices. We must consult in each case the . . . purpose of the specific articles [of the treaty] involved."), *cert. denied*, 254 U.S. 643 (1920).

(2nd Cir. 1990) (injury to governmental function not "property") (citing *Hawaii v. Standard Oil of CA*, 405 U.S. 251, 262 (1972)). Likewise, the builders and plumbers cannot be counted on to vindicate RICO. Should they sue, however, the character of the damage to them would be distinct, though related, to the damages suffered by Petitioners. To be sure, each received worthless plumbing parts, one to install, one for whom they would be installed. To that degree, part of the damage to each would be similar: the out-of-pocket costs of paying for a defective part. The financial consequences to Petitioners, however, extend far beyond the price of worthless plumbing parts; a plumbing *system* was installed; it must be taken out; if it fails, as it has, *distinct* damages were done to Petitioners that a suit by a builder *will not* and *cannot remedy*. Indeed, these damages are *precisely* like damages that this Court in *Holmes* itself recognized to be outside of its principal remoteness holding. *Holmes*, 503 U.S. at 272 n.19. Under the three *Holmes* factors, therefore, the damages to Petitioners relative to the other victims of the "scheme to defraud" are concrete, not speculative, and they are easily ascertained. Duplication with other victims is minor and easily allocated.[13] Finally, as a practical matter, since the plumbing systems only fail after – sometime substantially after – being installed, Petitioners are in the best, if not only, position to sue under RICO, not only for the "value" of the systems, but also for the substantial consequential damages an installed plumbing system ultimately inflicted on them, when it was made with Respondents' defective pipes and acetal fittings.

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[13] The single satisfaction rule will protect the Respondents to the degree that the identical "value" of a defective part might be recovered by others. *Morley v. Cohen*, 888 F.2d 1006, 1012-13 (4th Cir. 1989).

That makes property owners like Petitioners the "best enforcers" of RICO here. Only they are in a position to recover "full" damages. *Holmes*, 503 U.S. at 273. No danger of a "massive and complex damage litigation" is present. *Holmes*, 503 U.S. at 274 (quoting *AGC*, 459 U.S. at 545). They are, therefore, the "proper plaintiffs" to sue under RICO. *Id.* at 274.

(7) "Scheme to Defraud."

The root of the Fifth Circuit's "reliance and inducement or target" rule lies in its confusing various kinds of "fraud," a term, as Prosser so ably teaches, that is "so vague that it requires definition in nearly every case." WILLIAM PROSSER *et al.*, LAW OF TORTS 727 (5th ed. 1984). The Fifth Circuit conflates "scheme to defraud" under Federal law[14] with "common law obtaining money by false pretenses," a crime, and "common law deceit," a tort – each containing a misrepresentation and reliance element – with "common law cheat," a crime that required a false symbol or token – but neither misrepresentation, inducement, reliance, nor a "target" status – and "conspiracy to defraud," a crime. In fact, "scheme to defraud" principally stems from a careful blend of "common law cheat" and "conspiracy to defraud."[15] "The common-law

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[14] The phrase appears in up to 500 Federal statutes as well as 50 sections of Title 18. *Mail Fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988) (Testimony of Acting Assistant Attorney General John C. Keeney). The development of "scheme to defraud" and its integration into civil RICO is traced in *Reflections* at 1583-1611 (App. B (Defraud)).

[15] *See generally*, Courtney Chetty Genco, *Whatever Happened to Durland: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337-64 (1992) (historical materials reviewed).

requirements of "justifiable reliance" and "damages" . . . plainly have no place in [establishing a violation of] the federal fraud statutes." *Neder v. United States* 527 U.S. 1, 24-25 (1999). Cheating – without misrepresentation – suffices to establish a "scheme to defraud." *Atlas Pile Driving Co.*, 886 F.2d at 991; *Reflections* at 1588 n.38 (collecting illustrative decisions). Courts read the "mail and wire fraud statutes [to] encompass two types of frauds; those in which misrepresentations are made, and those in which no misrepresentations are made." *Murr Plumbing Co., Inc. v. Scherer Bros. Financial Services Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995) (RICO "scheme to defraud"); *Reflections* at 1588 n.39 (collecting decisions). "Scheme to defraud" includes the misappropriation of confidential information, that is, embezzlement, which does *not* necessarily include misrepresentation, inducement, or reliance. *Carpenter v. United States*, 484 U.S. 19, 27 (1987).[16] "A comprehensive definition of 'scheme to . . . defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions." *Fasulo v. United States*, 272 U.S. 620, 628 (1926). But its focus is on " 'wronging one in his property rights by dishonest methods or schemes' and [it] 'usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.' " *Carpenter*, 484 U.S. at 27 (citations omitted). If "scheme to defraud" is *not* limited to simple, face-to-face, misrepresentation fraud – as it is not, but as the Fifth Circuit's blanket rule presupposes – then requiring "reliance" and "inducement" or "target status" to establish the "proximate cause" nexus between "scheme to defraud" and "injury to business or

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[16] *Accord UnitedHealth Care Corp.*, 88 F.3d at 571 n.5 and 572 (RICO mail fraud; theft of insurance premiums; detrimental reliance not required; causation shown).

property" under RICO is simply unintelligible. In a particular instance, they may be, of course, *sufficient*, but they are not *necessary* in *all* instances, as the decisions of the other circuits so aptly show. In short, RICO added "proximate cause" to "scheme to defraud", but "proximate cause" may be established in a variety of ways.[17]

C. The Fifth Circuit's Decision Is Consistent With The Decisions Of The Sixth And Seventh Circuits.

The Fifth Circuit's opinion is not, however, an aberration. Its precise formulation of a "reliance and inducement or target" rule is also found, most recently, in the Seventh Circuit's decision in *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 606 (7th Cir. 2000). *See also Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989), which is correctly cited by the Fifth Circuit. (214 F.3d at 560 n.16; App. 7a) The Fifth Circuit's approach, if not the precise

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[17] The proper approach to "proximate cause" under RICO is found in this Court's jurisprudence under the antitrust statutes, as *Holmes* teaches. *Holmes*, 503 U.S. at 664-70 (citing AGC). In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 495-96 (1988) (antitrust), this Court, for example, held that a manufacturer of plastic conduit could sue a manufacturer of steel conduit that improperly influenced a trade association, which, in turn, promulgated a safety code that contained false product safety information about plastic conduit, which, in turn, influenced market participants either not to use plastic conduit or to disapprove its use by others. The Fifth Circuit's blanket rule for "proximate cause" cannot be squared with *Allied Tube & Conduit Corp.* In *Allied* "proximate cause" was established on general grounds – without a requirement of reliance or inducement or target status. Reliance, inducement or target status is simply not, therefore, the *sine qua non* of "proximate cause" – under antitrust or RICO, as the other circuits properly recognize.

rule, is also found in Sixth Circuit decisions. *See, e.g., Central Distributors of Beer, Inc. v. Conn.*, 5 F.3d 181, 184 (6th Cir. 1993), which the Court also correctly cites. (214 F.3d at 560 n.16; App. 7a). This is, therefore, the square conflict in the decisions of the courts of appeal that this Court must resolve to set right "scheme to defraud" litigation under RICO.

II. CONTAINING A DUAL CRIMINAL AND CIVIL ENFORCEMENT MECHANISM, RICO REFLECTS CONGRESS' CONSIDERED JUDGMENT HOW ENTERPRISE CRIMINALITY SHOULD BE TREATED; THE FIFTH CIRCUIT'S PROXIMATE CAUSE TEST, IN CONFLICT WITH OTHER CIRCUITS, UNDERMINES RICO'S FAIRNESS AND EFFECTIVENESS IN THE NATION'S MARKETPLACE.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as"RICO."[18] Title IX was drafted to deal with "enterprise criminality."[19] It embodied a novel approach to the administration of justice. "[C]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law." *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 150 (1987). 18 U.S.C. § 1961(4) ("enterprise") was drafted in the form of an ostensive definition; it is not denotative. "Enterprise" includes illicit as well as licit entities. *United States v. Turkette*, 452

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[18] 18 U.S.C. § 1961 *et seq.*

[19] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (" 'enterprise criminality' " consists of " 'all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors' ") (citation omitted).

U.S. 576, 580-93 (1981).[20] 18 U.S.C. § 1961(5) ("pattern") was not drafted in the form of definition; it is a limitation. *H.J. Inc.*, 492 U.S. 237.[21]

Like the antitrust statutes, Congress deliberately used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 248-49. "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute . . . ". *Id.* at 248.

The scope of RICO is best seen by examining its antitrust parentage. *Holmes*, 503 U.S. at 267. Like RICO, the antitrust statutes contain a dual system of enforcement – criminal and civil. This Court teaches that the civil antitrust "treble-damage remedy is needed precisely for the purpose of encouraging *private* challenges to antitrust violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original). Such "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining & Mfg. Co., v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965).

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[20] *See also N.O.W.*, 510 U.S. at 259 n.5 ("enterprise" may play different roles under RICO, not merely "plaintiff" or "defendant," including "prize," "instrument," "victim" or "perpetrator") (citation omitted).

[21] "Pattern" reflects relationship and continuity. *See, e.g., Ahmad v. Rosenblatt*, 118 F.3d 886, 889 (1st Cir. 1997) (Breyer, J.) (single incident not "pattern"; "pattern" reflects: (1) relationship of purposes, participants, and methods, and (2) continued activity or its threat).

Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the antitrust statutes. *Reiter*, 442 U.S. at 344.[22] Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators[,] deprive[s] them of the fruits of their illegal actions, and . . . provide[s] ample compensation to the victims of [RICO] violations." *Blue Shield of VA*, 457 U.S. at 472 (citing *Pfizer Inc. v. India*, 434 U.S. 308, 313-14 (1978)).[23]

Blue Shield, too, teaches that "artificial limitations" are not to be "engrafted" on the private treble damage remedy of antitrust; if it is to be limited, that limitation must be consistent with, not frustrate, its antitrust (or RICO) purposes; its language should, therefore, be given its "naturally broad and inclusive meaning." *Id.* It is, in short, the policies of the antitrust statutes (or RICO) that trump – or ought to trump – not yield to, other sources of law. *Id.* at 485.

Indeed, RICO makes the principle of its liberal construction a matter of *express* statutory language. Like the antitrust laws, "RICO is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 497-98 (1984) (citing 84 Stat. 947) ("liberally construed to effectuate its remedial purposes"); *American Society of Mechanical Engineers, Inc.*

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[22] *See* Michael Block *et al.*, *The Deterrent Effect of Antitrust Enforcement*, 89 JOURNAL OF POL. ECONOMY 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a credible threat. . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . ").

[23] *Accord Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. at 1982 (2000) (RICO) ("not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity.'*** The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering. . . . ") (citations omitted).

v. Hydrolevel Corp., 456 U.S. 556, 568-69 (1982) (antitrust) ("broad, remedial effect"; narrow "Victorian common law" does not limit treble damage recovery) (citing *Perma Life Mufflers, Inc., v. Int'l Parts Corp.*, 392 U.S. 134, 138-39 (1968) (the "ancient" defense of *in pari delicto* not applied under antitrust law)).

RICO and the antitrust statutes, therefore, are well-integrated. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." CARL KAYSEN *et al.*, ANTITRUST POLICY 17 (1959). Antitrust laws properly focus on the third; RICO properly focuses on the first two. Antitrust laws guarantee a *free* market; RICO guarantees a market characterized by *integrity* – physical and fiscal.[24]

The significance of this Petition to the fair and effective administration of RICO can hardly be overstated. A substantial portion of civil RICO litigation enforces Federal "scheme to defraud" standards. *Agency Holding Corp.*, 483 U.S. at 149. Because of RICO's "pattern" element, an enforcement action can, more often than not, be brought in more than one circuit. *See* 18 U.S.C. § 1965 (nationwide venue and service of process provisions). Knowledgeable litigants can, therefore, "choose" the "best" circuit in which to bring a RICO case based, not on the merits of their case, but on conflicts in circuit court

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[24] The parallels between antitrust and RICO are reflected in the data on the relation between criminal and civil litigation. Between 1960 and 1980, of the civil and criminal cases brought under the antitrust provision by the Government or private parties, 84% were instituted by private plaintiffs. UNITED STATES DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 431 (1981). The data on the ratio of criminal to civil RICO suits are now roughly the same. *See* Blakey *et al., Myths That Bolster Efforts to Rewrite RICO*, 43 VAND. L. REV. 851, 1020 (1990)

law, not an edifying picture in a *national* system of law. Not only is the specter of initial forum shopping raised, but also motions to transfer that have as their real purpose to obtain more favorable circuit law, not a more convenient forum, can be squarely foreseen.[25] This litigation could have been brought in *any* circuit, but Houston, Texas, which was Respondent Shell's principal place of business and the center of the "scheme to defraud," is where it belonged, and it is where it was rightly brought by Petitioners. (App. 48a) The result achieved should not have depended on the choice of forum in a *national* system of justice.

Conflicts between circuits on these aspects of "proximate cause" – an issue that is present in *all* civil RICO actions – are simply intolerable. These matters have been fully briefed and argued in the circuit courts in numerous appeals; the positions of the circuits are now hardened. It is time for this Court to settle these important issues, which are today so intransigently in conflict. These conflicts – just about a decade old since *Holmes* – are, moreover, hardly new to the law. Almost forty years ago, Prosser authoritatively surveyed many of them in the law generally in *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1964). The considerations -- old and new – supporting the various positions between the circuits are well-articulated. To permit them to fester any longer is not fair to litigants, and it undermines RICO effectiveness in the Nation's marketplace. Here, if anywhere, uniformity of *Federal* law is in the interest of justice.

Because Congress found that under the law in 1970 "the sanctions and remedies available" were "unnecessarily limited in scope and impact," 84 Stat. 923, it

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[25] *Tel-Phonic Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1338 (5th Cir. 1992) (law of transferee circuit is applied).

enacted RICO to provide enhanced criminal and civil sanctions, mandated their liberal construction to "effectuate . . . [RICO's] remedial purposes," 84 Stat. 947, and provided that its remedies, criminal and civil, Federal and state, were to co-exist. *Id.* ("[n]othing in this title shall supersede" other legal remedies); *Haroco Inc. v. Am. Nat'l Bk. & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). ("Congress enacted RICO in order to supplement, not supplant the available remedies since it thought those remedies offered too little protection for the victims"), *aff'd on other grounds*, 473 U.S. 606 (1985). The various sanctions under RICO's innovative enforcement design include fines, imprisonment, forfeiture, injunctions, and treble damage relief for "person[s] injured" in their "business or property" by reason of a "violation" of the statute. *See* 18 U.S.C. §§ 1963, 1964. They must be permitted to work together – fairly, effectively, and uniformly – throughout the Nation.

No court ought now reweigh – under the guise of an "interpretation" of RICO – the "balance" Congress struck in 1970 between "opposing policy arguments," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978), strike a new "compromise," *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), or rewrite a "carefully crafted piece of legislation," *Iannelli v. United States*, 420 U.S. 770, 789 (1975). In 1970, Congress "announce[d its] . . . considered judgment." *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (quoting *Mobil Oil Corp.*, 436 U.S. at 625). Congress still sits; it can – as it has – amended RICO. *See Reflections* at 1676-1702 (tracing the enactment securities reform legislation). It has *not* enacted *general* limitations on RICO's enforcement of "scheme to defraud." That ought to end the matter, absent constitutional considerations, which are not implicated here. *Turkette*, 452 U.S. at 587 ("There

is no argument that Congress acted beyond its power. . . . That being the case, the courts are without authority to restrict the application of . . . [RICO]"). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt*, 229 N.Y. at 28-29, 128 N.E. at 186.

CONCLUSION

For these reasons, Petitioners respectfully urge this Court to grant their Petition for a Writ of Certiorari and to resolve this intolerable conflict between the circuits on RICO's interpretation where a "scheme to defraud" is fairly alleged.

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No. _____

In The

Supreme Court of the United States

SUMMIT PROPERTIES, INC. et al.,

Petitioners,

v.

HOECHST CELANESE CORP., formerly known as CELANESE CORP., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20622

SUMMIT PROPERTIES INC.; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; MCGREGOR/MCGUIRE LP; HENDERSON/MCGUIRE PARTNERS LP; OAK RIDGE/MCGUIRE PARTNERS LP; WAVERLY PLACE/ SUMMIT PARTNERS LP,

Plaintiffs - Appellants,

versus

HOECHST CELANESE CORP., formerly known as Celanese Corporation; HOECHST CORPORATION; E. I. DUPONT DE NEMOURS, AND CO.; SHELL OIL COMPANY, doing business as Shell Chemical Company; VANGUARD PLASTICS INC.; BOW INDUSTRIAL CORP.; HOUSEHOLD INTERNATIONAL INC.,

Defendants - Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(Filed Jun. 07, 2000)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and WARD,* District Judge.

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*District Judge of the Eastern District of Texas, sitting by designation.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Today we are invited to read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. We are unpersuaded that RICO can be extended so far by such a marriage of distinct duties and liability regimes. Consequently, we AFFIRM the dismissal of the plaintiffs' RICO claims against the defendant manufacturers of polybutylene plumbing systems and components.

I

The plaintiffs own properties in which polybutylene (PB) plumbing systems were installed. PB is a by-product of oil-refining. In the 1970s, Shell Oil Company purchased the exclusive right to sell PB in the U.S. for a 10-year period. Shell then sold PB resin pellets to pipe extruders, such as Vanguard and Bow, who made tubing from the pellets. The defendants in this suit are manufacturers who sold either PB plumbing systems or their components parts, including Shell, DuPont, Hoechst Celanese, Household International, Vanguard, and Bow.

The plaintiffs contend that the defendants manufactured and marketed these systems and components through a complex scheme to defraud. The claims revolve around core allegations that the defendants made knowingly false claims in marketing PB, including assertions that (1) it is suitable for use as a hot and cold potable water plumbing systems; (2) it will last 50 years; (3) it

will not corrode; (4) it is easy, reliable, simple, proven and fast; and (5) it will not occasion serious service problems.

The truth, plaintiffs allege, is that PB plumbing is worse than worthless, that it not only fails to perform its intended function, but also that it causes severe property damage; that PB's inherent defects render it unsuitable for use as a water distribution system, including the fact that after installation, such systems degrade, crack, leak, and spray water.

The plaintiffs allege that the defendants engaged in a conspiracy to defraud by directing a massive, fraudulent marketing plan designed to make PB the "material of choice" in the plumbing market, so that by the end of Shell's ten-year period of exclusive rights, Shell would have a commanding market position. This marketing campaign was directed at building code approval officials, members of the building industry such as builders and plumbers, and other consumers.

II

The plaintiffs filed suit in district court alleging violations of civil RICO.[1] The district court granted the defendants' Rule 12(b)(6) motion to dismiss because the plaintiffs conceded that they did not detrimentally rely on any of the defendants' allegedly fraudulent misrepresentations that served as the basis for the RICO claims. The district court held that such reliance is a necessary predicate for establishing proximate cause under RICO. It

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[1] 18 U.S.C. § 1961 *et seq.*

denied a motion for reconsideration, and the plaintiffs appealed.

III

RICO provides that "[a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor. . . . "[2] The Supreme Court, in *Holmes v. Securities Investor Protection Corp.*,[3] explicitly confirmed that the "by reason of" language in RICO requires a causal connection between the predicate mail or wire fraud and a plaintiff's injury that includes "but for" and "proximate" causation.[4]

The question before us is whether a plaintiff's reliance on the predicate mail or wire fraud is necessary in order to establish proximate causation. In *Armco Industries Credit Corp. v. SLT Warehouse Co.*,[5] this court distinguished mail fraud under RICO from common law fraud and stated that "to find a *violation* of the federal mail fraud statute it is not necessary that the victim have detrimentally relied on the mailed misrepresentations."[6] Ours is a different question.

It is true that the court in *Armco* found no error when the trial judge refused to instruct the jury that a showing of reliance was necessary in order to establish proximate

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[2] 18 U.S.C. § 1964(c) (emphasis added).

[3] 503 U.S. 258 (1992).

[4] *See id.* at 265-68.

[5] 782 F.2d 475 (5th Cir. 1986).

[6] *Id.* at 482 (emphasis added).

causation under RICO.[7] It is equally the case that the court observed that reliance is not an element of the underlying offense of mail fraud, and ignored the issue of whether such reliance would be necessary in order to prove proximate causation.[8] *Armco* aside, these issues are distinct: the government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff "faces an additional hurdle" and must show an injury caused "by reason of" the violation.[9]

When *Armco* was decided, the Fifth Circuit had not yet interpreted the "by reason of" language of 18 U.S.C. § 1964(c) to impose a proximate causation requirement,[10] and this circuit still allowed recovery for more indirect injuries.[11] Since that time, the Fifth Circuit in *Zervas v.*

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[7] *See id.*

[8] *See id.* at 481-82.

[9] *Pelletier v. Zweifel*, 921 F.2d 1465, 1498, 1498-99 (11th Cir. 1991).

[10] *See Zervas v. Faulkner*, 861 F.2d 823, 834 (5th Cir. 1988) (adopting the proximate causation requirement and joining the Second, Fourth, and Seventh Circuits); *see also id.* (noting that a similar approach was taken in *National Enterprises, Inc. v. Mellon Financial Services Corp.*, 847 F.2d 251 (5th Cir. 1988), but that the term "proximate cause" was not employed).

[11] *See Ocean Energy II, Inc. v. Alexander & Alexander*, 868 F.2d 740, 744 (5th Cir. 1989) ("[W]e [have] rejected the position taken by the Seventh, Eleventh and possibly Third Circuits interpreting the language in [*Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985)] as allowing recovery only for direct injuries.").

Faulkner[12] and the Supreme Court in *Holmes* have explicitly adopted a traditional proximate causation requirement.[13] *Armco* does not then answer the question before us: whether reliance is necessary to establish proximate cause under RICO. To hold otherwise would imply that *Armco* silently imposed a proximate causation requirement that was not explicitly adopted until several years hence in *Zervas* and *Holmes*.[14] To the extent it held that proximate cause was not required, it has been overturned by *Holmes*.

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[12] 861 F.2d 823 (5th Cir. Dec. 15, 1988).

[13] *Holmes*, 503 U.S. at 265-68; *Zervas*, 861 F.2d at 834.

[14] Since *Holmes* this circuit has stated that "reliance is not an element of mail fraud" for RICO liability. *See Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 533 (5th Cir. 1992). In *Akin*, however, this court noted only that reliance is not an element of an underlying mail or wire fraud violation. *See id.* (citing *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. Nov. 2, 1988)). Whether the plaintiff's damages were proximately caused by reason of such violation was not at issue. *See id.*

Abell cited *Armco* for the proposition that reliance is not an element of the underlying mail or wire fraud. *See Abell*, 858 F.2d at 1129. Like *Armco*, *Abell* was decided before *Zervas* and did not discuss the issue of whether reliance is necessary for proximate causation. Instead of arguing proximate cause, the defendant claimed that "the evidence did not establish . . . *any* causal connection between the plaintiffs' . . . injuries and [the defendant's] misrepresentations." *Id.* at 1129 (emphasis added). The Supreme Court subsequently vacated *Abell*, *see Fryar v. Abell*, 492 U.S. 914 (1989), and on remand this court remanded the case to the district court for reconsideration, *see Abell v. Potomac Ins. Co.*, 884 F.2d 196 (5th Cir. 1989). In the second appeal to this court, issues related to reliance did not arise. *See Abell v. Potomac Ins. Co.*, 946 F.2d 1160 (5th Cir. 1991).

On appeal, the plaintiffs do not quarrel with the district court's acceptance of their concession that they "did not rely on anything Defendants said or published in purchasing their properties."[15] Instead, the plaintiffs steadfastly maintain that individual acts of reliance are simply unnecessary in order to recover for damages resulting from civil RICO fraud. Most other circuits, however, require a showing of detrimental reliance by the plaintiff,[16] which is consistent with *Holmes'* admonition

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[15] Plaintiffs' Memorandum of Law in Reply to Various Motions and Memoranda of Defendants, at 24 ¶ 43 [R. 1198], *quoted in* Memorandum Opinion and Order, at 2 [R. 1241]; *see also* Brief of Appellants, at 6 ("Because it did not have to do so, Summit did not claim that it relied on [the defendants'] misrepresentations and omissions regarding [the] inherently defective and worthless plumbing system.").

The plaintiffs only remaining allegations of reliance involved the "technically accurate" representations by various entities who stated that the plaintiffs' properties confirmed [sic] to the local building codes. *See* Plaintiffs' Second Amended Complaint, at 24 ¶ 73 [R. 892]; Plaintiffs' Memorandum of Law in reply to Various Motions and Memoranda of Defendants, at 25 ¶ 45 [R. 1197]. Reliance on technically accurate representations by entities other than the defendants is not reliance upon misrepresentations by the defendants.

[16] *See, e.g., Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 746-47 (3d Cir. 1996); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994); *Central Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-500 (11th Cir. 1991); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989).

that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation.[17]

The rationale for requiring reliance in cases such as this one becomes clear in the light cast by the distinction between causation as an element of a claim for fraud and producing cause as an element of a claim for products liability.[18] The linkage between design defect and injury is between the *defect* and the injury. With a claim for fraud, however, the linkage is between the defendants' *fraud* and the injury.

As a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. With the abolition of privity requirements, injuries produced by product defect may be actionable by all users including those remote in the distribution chain from a defendant manufacturer. The causal connection between a misrepresentation and a subsequent harm, however, vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision.

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[17] *See Holmes*, 503 U.S. at 268.

[18] To recover under Texas products liability law, a design defect must be a "producing cause" of injury. *See* Tex.Civ.Prac. & Rem.Code Ann. § 82.005(a). A producing cause is "an efficient, exciting, or contributing cause, which in a natural sequence, produced injuries or damages complained of, if any." *Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex.1975). Our reference to Texas law, however, is for purposes of illustration only.

In other words, even if intermediary builders, plumbers, code officials, or prior owners relied on the defendants' alleged misrepresentations when choosing to use or approve PB plumbing, that does not tell us whether the defendants' fraud proximately caused the plaintiffs' injuries, for which the defect was a producing cause. At best, any fraud during the sale of those products proximately injured only those initial purchasers who relied on the alleged misrepresentations, since the fraud facilitated a sale that might not otherwise have been made.

Of course, if the sales would not have occurred absent the fraud, the fraud would have been a "but-for" cause of the plaintiffs' injuries.[19] Nevertheless, the plaintiffs came into possession of PB systems without relying on the alleged fraud. Whether they received their systems from the manufacturers or from prior property owners, any past fraud was not a proximate cause of the plaintiffs' resulting injuries since fraud did not induce the purchase transactions.[20]

This is only to recognize the distinct character of claims for fraud and claims for defective products resting on the law of products liability. In general, fraud

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[19] If the relevant decisionmakers knew the limitations of the product but would have bought it anyway because of its low price, for example, the fraud would not have been a "but-for" cause of the plaintiffs' damages.

[20] *See Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1318 (11th Cir. 1998) (noting that a plaintiff's injury is not proximately caused by a defendant's misrepresentations when the injury results only from the detrimental reliance of a third party).

addresses liability between persons with direct relationships – assured by the requirement that a plaintiff has either been the target of a fraud or has relied upon the fraudulent conduct of the defendants. The Fourth Circuit, recognizing the target wing of these twin limits of liability, held open the possibility that a plaintiff company may not need to show reliance when a competitor lured the plaintiff's customers away by fraud directed at the plaintiff's customers.[21] In the current case, for example, the defendants' competitors might recover for injuries to competitive position, but that circumstance is of no aid to these plaintiffs. Accepting as claimed that the defendants' strategy may have been to gain market share by fraud in the initial sale of PB components, it is not contended that these particular plaintiffs were the targets of a scheme to defraud accomplished by defrauding others.[22]

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[21] *See Mid Atlantic Telecom, Inc. v. Long Distance Services., Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994).

[22] Similarly, we do not think the current situation is similar to one discussed in *Holmes*, where the Court left open the possibility that the customers of an insolvent brokerage might recover under RICO for losses stemming from a series of fraudulent brokerage transactions despite the fact that those customers did not in any sense "rely" on a misrepresentation. *See* 503 U.S. at 272 n.19.

In that situation, the fraudulent brokerage transactions imposed immediate risks on the brokerage's customers by increasing the likelihood of the brokerage's insolvency, even if the conspirators did not intend such risks to fall on those customers through their sham transactions.

Nevertheless, when an action poses a high and foreseeable risk on a third party, we may view the resulting injury as deliberate for the purpose of liability. *See, e.g., Matter of EDC, Inc.*, 930 F.2d 1275, 1279 (7th Cir. 1991) (Posner, J.). In that sense,

Plaintiffs' able counsel has understandably fled to the "fraud on the market" theory of constructive reliance, a theory born in securities litigation. It assumes that prices in an efficient market incorporate the relative importance of public information, whether that information is true or false.[23] If publicly announced information regarding a security is fraudulent, a subsequent purchaser of that security from the market is said to have constructively relied on the fraudulent statements because they were incorporated into the market price. The case proceeds despite the fact that the defendant and the purchaser had no direct relationship and reliance upon the false statements could not be shown. This because under the theory, the market as an efficient translator of data to price acted as an intermediary, connecting plaintiff and defendant.

No court has accepted the use of this theory outside of the context of securities fraud, and one circuit has expressly rejected its use in the context of a similar civil RICO case.[24] An efficient market is a critical element of a market's role as an intermediary. There is no pretense of

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the brokerage customers may be seen as direct and contemporaneous victims of the fraudulent scheme and within the scope of the already noted exception.

In the present case, however, the plaintiffs' risks of injuries did not arise as direct and contemporaneous results of any alleged fraud, but instead arose only later, through the purchases of allegedly defective plumbing by transactions which were not tainted with fraud.

[23] *See Basic Inc. v. Levinson*, 485 U.S. 224, 244-47 (1988) (citing *In re LTV Sec. Litig.*, 88 F.R.D. 134, 143 (N.D.Tex.1980)).

[24] *See Appletree Square I v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994).

such a market here and the fraud on the market doctrine is not applicable.

IV

In sum, when civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation. To hold otherwise would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of the products, even if no plaintiff relied on those representations. This is not a statement of our policy choice. We are not persuaded that by its "by reason of" phrase Congress intended such a federalization and escalation of the states' laws of product liability – laws that have hardly been proved to be anemic in their common law use of economic incentives to achieve desired social goals. The threshold reliance requirement is determinative in this case. We need not and do not reach other issues raised by the defendants. Agreeing with the district court, we AFFIRM its dismissal of this suit.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	CIVIL ACTION NO. H-98-1954
Plaintiffs,	§	
vs.	§	
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed July 9, 1999)

This civil RICO case is before the Court on Plaintiffs' Motion to Alter or Amend Judgment and for Reconsideration Under Rule 59(e) (Instrument No. 121), to which Defendants have filed their opposition. The Court has again reviewed the record in this case, as well as the applicable legal authorities. Based on this review, the Court **denies** Plaintiffs' Motion.

I. STANDARD FOR RULE 59(e) MOTION

Rule 59(e) of the Federal Rules of Civil Procedure is designed to "correct manifest errors of law or fact or to present newly discovered evidence." *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990); *Waltman v. International Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). A district court considering a Rule 59(e) motion must strike

a proper balance between the need for finality in litigation and the need to render judgments based on all available evidence. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990). A final judgment "generally will be set aside only to accommodate some new matter that could not have been asserted [before judgment]." *Briddle v. Scott*, 63 F.3d 364, 379-80 (5th Cir.), *cert. denied*, 516 U.S. 1033 (1995). A Rule 59 motion is not the "proper vehicle for rehashing old arguments. . . . " *Resolution Trust Corp. v. Holmes*, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994).

II. ANALYSIS

Plaintiffs present no new arguments in support of their Motion. Instead, Plaintiffs again argue that reliance is not necessary to prevail on a civil RICO claim based on mail fraud or wire fraud. Plaintiffs again cite cases which hold that reliance is not a necessary element of a criminal mail fraud or wire fraud charge. Specifically, Plaintiffs continue to rely on *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986). Plaintiffs also cite *Neder v. United States*, 119 S.Ct. 1827 (1999), in which the United States Supreme Court noted that federal criminal charges of mail fraud and wire fraud do not require proof of justifiable reliance or damages. Plaintiffs, however, continue to ignore the distinction between the elements necessary to prove the civil RICO predicate act and the necessity to establish proximate causation.

As discussed more thoroughly in the Court's prior Memorandum and Opinion in this case, the proximate causation issue was thoroughly and persuasively

addressed by the Fourth Circuit in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), and by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). The United States Supreme Court, subsequent to the *Armco* decision, also held that civil RICO plaintiffs must prove that they were ***directly*** injured by the RICO violation. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 270-74 (1992). Similarly, this Court held in *Heden v. Hill*, 937 F. Supp. 1230 (S.D. Tex. 1996), that a plaintiff cannot maintain a civil RICO claim based on mail fraud or wire fraud as the predicate acts absent allegations that the defendant made misrepresentations to the plaintiff, through the use of the mails or wires, and that the plaintiff relied on those misrepresentations to his detriment. *Heden*, 937 F. Supp. at 1243.

III. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Plaintiffs have failed to present new or persuasive arguments in support of their Rule 59(e) Motion. The law regarding the necessary proof required of civil RICO plaintiffs is clear. Plaintiffs are correct that reliance is not required to establish the predicate act element of civil RICO, if the predicate act is either mail fraud or wire fraud. Plaintiffs must, however, satisfy the remaining elements of their civil RICO claim, including the proximate causation requirement. Accordingly, it is hereby

ORDERED that Plaintiffs' Motion to alter or Amend Judgment and for Reconsideration Under Rule 59(e) (Instrument No. 121) is **DENIED.**

SIGNED this 9 day of July, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., et al.,	§	**C.A. NO. H-98-1954**
Plaintiffs	§	**JURY TRIAL DEMANDED**
vs.	§	
HOECHST-CELANESE CORPORATION f/k/a/ CELANESE CORPORATION, et al.,	§	
Defendants	§	

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Notice is hereby given that SUMMIT PROPERTIES, INC., et al. ("All Plaintiffs") in the above named case appeals to the United States Court of Appeals for the Fifth Circuit from the *MEMORANDUM OPINION AND ORDER* and *FINAL ORDER OF DISMISSAL* dismissing All Plaintiffs' Civil RICO claims with prejudice pursuant to Rule 12(b)(6) and dismissing All Plaintiffs' state law claims without prejudice, entered in this action on May 24, 1999.

Respectfully submitted,

/s/ Barry L. Racusin
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State Bar #16451800
Federal ID #6168
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ATTORNEY FOR PLAINTIFFS

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above instrument has been served by certified mail, return receipt requested, on all parties identified on the attached Service List, on this the 24th day of June, 1999.

/s/ [Illegible]

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	CIVIL ACTION NO. H-98-1954
Plaintiffs,	§	
vs.	§	
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed May 24, 1999)

Plaintiffs are owners of commercial and residential properties in which polybutylene plumbing systems were installed. Defendants are either manufacturers of the component parts of the polybutylene plumbing systems or suppliers or raw material used in the plumbing systems. Plaintiffs have sued Defendants, alleging that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("Civil RICO").

The case is now before the Court on Defendants' Motions to Dismiss (Instruments No. 99, No, 102, No. 103, No. 106, and No. 110), to which Plaintiffs have filed a consolidated response (Instrument No. 113).[1] The Court

---

[1] In their Resposne, Plaintiffs state that Defendants' Motions to Dismiss should be denied because Judge Norman Black denied similar motions to dismiss in *Villager Lodge, Inc. v.*

has thoroughly reviewed the motions and accompanying briefs, Plaintiffs' response, the Second Amended Complaint, Plaintiffs' RICO Statement, and the applicable legal authorities. Based on this review, the Court **grants** Defendants' motions to dismiss the Civil RICO claim. Having dismissed the only federal claim and absent allegations of complete diversity of citizenship, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims which are dismissed without prejudice.

I. PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that Defendant Shell Chemical Company organized various manufacturers of polybutylene plumbing and component parts into an enterprise which Plaintiffs refer to as the "PB Enterprise." Plaintiffs allege that the purpose of the PB Enterprise was to promote polybutylene plumbing systems, create an enormous demand for the systems, and cause polybutylene to become the material of choice for plumbing and potable water service distribution systems.

Plaintiffs allege that, in furtherance of PB Enterprise's goal to promote polybutylene plumbing systems, Defendants made material misrepresentations to building

---

Hoechst-Celanese Corp., Civil Action No. 96-3341. The Court notes that Judge Black denied the motions to dismiss, not on the merits, but on unspecified "infirmities in the factual basis supporting Defendants' motions to dismiss the civil RICO claims." *Villager Lodge*, Civil Action No. 96-3341, Instrument No. 109.

code entities, builders, and plumbers concerning the attributes of the systems. Plaintiffs concede that they "did not rely on anything Defendants said or published in purchasing their properties. . . . " Response, Instrument No. 113, at 24. Instead, Plaintiffs allege that they relief on the building inspectors who told them that the properties' plumbing systems satisfied local building codes.

Defendants filed motions to dismiss, arguing *inter alia* that Plaintiffs' allegations were insufficient to support the proximate causation requirement of their Civil RICO claim.

II. STANDARD FOR MOTION TO DISMISS

Rule 12(b)(6) allows for dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Rule 12(b)(6) dismissal "is appropriate only if there is no set of facts that could be proven consistent with the allegations in the complaint that would entitle the plaintiff to relief." *Power Entertainment, Inc. v. National Football League Properties, Inc.*, 151 F.3d 247, 249 (5th Cir. 1998). The factual allegations "must be reviewed in the light most favorable to the plaintiff." *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). Unlike motions for summary judgment, the Rule 12(b)(6) motion "only tests whether the claim has been adequately stated in the complaint." *Doe v. Dallas Independent School Dist.*, 153 F.3d 211, 220 (5th Cir. 1998).

III. ANALYSIS

The Civil RICO statute requires the plaintiff to prove that he was "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964. The clear language of the statute imposes three separate requirements: (1) injury to the plaintiff's business or property; (2) proximate causation ("by reason of"); and (3) the underlying wrong (the section 1962 violation). The Fifth Circuit has held that proof of the underlying wrong, if mail or wire fraud, does not require proof of detrimental reliance. *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986). The Fifth Circuit has not addressed, however, the issue of reliance as an element of the proximate cause requirement.[2]

The proximate causation issue was thoroughly and persuasively addressed by the Fourth Circuit in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), and by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S 855 (1991). In *Brandenburg*, the Fourth Circuit held that civil RICO plaintiffs who base their claim on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were

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[2] The Fifth Circuit stated in *Khurana v. Innovative Health Care Systems, Inc.* that the proximate cause requirement may be satisfied by proof of "reliance on the predicate fraud act." The Fifth Circuit's decision was subsequently vacated and the appeal dismissed as moot. *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 151 (5th cir. 1997), *cert. granted and judgment vacated*, 119 S. Ct. 442 (1998).

the proximate cause of the alleged injury to their property or business. *Brandenburg*, 859 F.2d at 1188-90. In *Pelletier*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier*, 921 F.2d at 1499-1500. *See also Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C. 1992) (no proximate cause because the "alleged predicate acts were all directed at third parties"), *aff'd*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993).

This Court previously held in *Heden v. Hill*, 937 F. Supp. 1230 (S.D. Tex. 1996), that a plaintiff cannot maintain a Civil RICO claim absent allegations that the defendant made misrepresentations to the plaintiff, through the use of the mails or wires, and that the plaintiff relied on those misrepresentations to his detriment. *Heden*, 937 F. Supp. at 1243. In *Heden*, the plaintiff could not maintain his Civil RICO claim because there were no alleged misrepresentations made to him and relied upon by him. *Id.* Instead, the plaintiff in *Heden* claimed that misrepresentations to third parties injured him in his business or property. *Id.*

Similarly, in this case Plaintiffs do not allege that fraudulent communications through mail and wire were directed to them and do not allege that they relied on any of the alleged misrepresentations to third parties. Instead, Plaintiffs allege that they relied on building inspectors who reported that the polybutylene plumbing systems satisfied building codes which had been established

based on material misrepresentations to the building code entities.

The Court concludes, based on its review of the civil RICO statute and the cases cited herein, that absent an allegation that Defendant made material misrepresentations to Plaintiffs and that Plaintiffs relief on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of Civil RICO. As a result, Plaintiffs Civil RICO claim must be dismissed.

Under 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over Plaintiffs' pendent state law claims. These matters are more properly dealt with in the state courts. *See Parker & Parsley Petroleum Co. v. Dresser Industries,* 972 F.2d 580, 585 (5th Cir. 1992) ("Out general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Plaintiffs have failed to state a claim under the RICO statute. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which will be DISMISSED WITH PREJUDICE by separate order.

IT IS FURTHER **ORDERED** that Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to being

refiled in the appropriate state court. Plaintiffs should take note that the period of limitations for the dismissed state claims is tolled for an additional period of thirty (30) days after entry of the Court's Final Order of Dismissal unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d).

SIGNED this 21 day of May, 1999, at Houston Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	CIVIL ACTION NO. H-98-1954
Plaintiffs,	§	
vs.	§	
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

FINAL ORDER OF DISMISSAL

(Filed May 24, 1999)

In accordance with the Memorandum Opinion and Order issued this day, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which is DISMISSED WITH PREJUDICE. Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to Plaintiffs' refiling the claims in the appropriate state court.

THIS IS A FINAL ORDER OF DISMISSAL.

SIGNED this 21 day of May, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	
Plaintiffs,	§	CIVIL ACTION NO.
vs.	§	H-98-1954
HOECHST-CELANESE CORPORATION, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed May 24, 1999)

Plaintiffs are owners of commercial and residential properties in which polybutylene plumbing systems were installed. Defendants are either manufacturers of the component parts of the polybutylene plumbing systems or suppliers or raw material used in the plumbing systems. Plaintiffs have sued Defendants, alleging that Defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("Civil RICO").

The case is now before the Court on Defendants' Motions to Dismiss (Instruments No. 99. No, 102, No. 103, No. 106, and No. 110), to which Plaintiffs have filed a consolidated response (Instrument No. 113).[1] The Court

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[1] In their Response, Plaintiffs state that Defendants' Motions to Dismiss should be denied because Judge Norman Black denied similar motions to dismiss in *Villager Lodge, Inc. v.*

has thoroughly reviewed the motions and accompanying briefs, Plaintiffs' response, the Second Amended Complaint, Plaintiffs' RICO Statement, and the applicable legal authorities. Based on this review, the Court grants Defendants' motions to dismiss the Civil RICO claim. Having dismissed the only federal claim and absent allegations of complete diversity of citizenship, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims which are dismissed without prejudice.

I. PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that Defendant Shell Chemical Company organized various manufacturers of polybutylene plumbing and component parts into an enterprise which Plaintiffs refer to as the "PB Enterprise." Plaintiffs allege that the purpose of the PB Enterprise was to promote polybutylene plumbing systems, create an enormous demand for the systems, and cause polybutylene to become the material of choice for plumbing and potable water service distribution systems.

Plaintiffs allege that, in furtherance of PB Enterprise's goal to promote polybutylene plumbing systems, Defendants made material misrepresentations to building code entities, builders, and plumbers concerning the

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attributes of the systems. Plaintiffs concede that they "did not rely on anything Defendants said or published in purchasing their properties . . . ." Response, Instrument No. 113, at 24. Instead, Plaintiffs allege that they relied on the building inspectors who told them that the properties' plumbing systems satisfied local building codes.

Defendants filed motions to dismiss, arguing *inter alia* that Plaintiffs' allegations were insufficient to support the proximate causation requirement of their Civil RICO claim.

II. STANDARD FOR MOTION TO DISMISS

Rule 12(b)(6) allows for dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Rule 12(b)(6) dismissal "is appropriate only if there is no set of facts that could be proven consistent with the allegations in the complaint that would entitle the plaintiff to relief." *Power Entertainment Inc. v National Football League Properties Inc.*, 151 F.3d 247, 249 (5th Cir. 1998). The factual allegations "must be reviewed in the light most favorable to the plaintiff." *Piotrowski v. City of Houston*, 51 F.3d 512, 514 (5th Cir. 1995). Unlike motions for summary judgment, the Rule 12(b)(6) motion "only tests whether the claim has been adequately stated in the complaint." *Doe v. Dallas Independent School Dist.*, 153 F.3d 211, 220 (5th Cir. 1998).

III. ANALYSIS

The Civil RICO statute requires the plaintiff to prove that he was "injured in his business or property by reason

of a violation of section 1962." 18 U.S.C. § 1964. The clear language of the statute imposes three separate requirements: (1) injury to the plaintiffs business or property; (2) proximate causation ("by reason of"); and (3) the underlying wrong (the section 1962 violation). The Fifth Circuit has held that proof of the underlying wrong, if mail or wire fraud, does not require proof of detrimental reliance. *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 482 (5th Cir. 1986). The Fifth Circuit has not addressed, however, the issue of reliance as an element of the proximate cause requirement.[2]

The proximate causation issue was thoroughly and persuasively addressed by the Fourth Circuit in *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988), and by the Eleventh Circuit in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). In *Brandenburg*, the Fourth Circuit held that civil RICO plaintiffs who base their claim on predicate acts of mail or wire fraud must allege both that they detrimentally relied on the fraudulent statements and that the fraudulent statements were the proximate cause of the alleged injury to their property or business. *Brandenburg*, 859 F.2d at 1188-90. In *Pelletier*, the Eleventh Circuit held that "when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have

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relied to his detriment on misrepresentations made in furtherance of that scheme."

Pelletier, 921 F.2d at 1499-1500. *See also Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1291-92 (D.S.C. 1992) (no proximate cause because the "alleged predicate acts were all directed at third parties"), *aff'd*, 998 F.2d 1009 (4th Cir.), *cert. denied*, 510 U.S. 993 (1993).

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Similarly, in this case Plaintiffs do not allege that fraudulent communications through mail and wire were directed to them and do not allege that they relied on any of the alleged misrepresentations to third parties. Instead, Plaintiffs allege that they relied on building inspectors who reported that the polybutylene plumbing systems satisfied building codes which had been established based on material misrepresentations to the building code entities.

The Court concludes, based on its review of the civil RICO statute and the cases cited herein, that absent an

allegation that Defendants made material misrepresentations to Plaintiffs and that Plaintiffs relied on the mail and wire fraud on which the Civil RICO claims are predicated, Plaintiffs cannot satisfy the proximate causation requirement for purposes of Civil RICO. As a result, Plaintiffs Civil RICO claim must be dismissed.

Under 28 U.S.C. § 1367(c)(3), the Court declines to exercise supplemental jurisdiction over Plaintiffs' pendent state law claims. These matters are more properly dealt with in the state courts. *See Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992) ("Our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed.").

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court concludes that Plaintiffs have failed to state a claim under the RICO statute. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which will be DISMISSED WITH PREJUDICE by separate order.

IT IS FURTHER **ORDERED** that Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to being refiled in the appropriate state court. Plaintiffs should take note that the period of limitations for the dismissed state claims is tolled for an additional period of thirty (30) days after entry of the Court's Final Order of Dismissal

unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d).

SIGNED this 21 day of May, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., *et al.*,	§	
Plaintiffs,	§	CIVIL ACTION NO.
vs.	§	H-98-1954
HOECHST-CELANESE CORPORATION, et al.,	§	
Defendants.	§	

FINAL ORDER OF DISMISSAL

(Filed May 24, 1999)

In accordance with the Memorandum Opinion and Order issued this day, it is hereby

ORDERED that Defendants' Motions to Dismiss (Instruments No. 99, No. 102, No. 103, No. 106, and No. 110) are **GRANTED** as to Plaintiffs' Civil RICO claim, which is DISMISSED WITH PREJUDICE. Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE to Plaintiffs' refiling the claims in the appropriate state court.

THIS IS A FINAL ORDER OF DISMISSAL.

SIGNED this 21 day of May, 1999, at Houston, Texas.

/s/ David Hittner
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., ET AL.	§	**CIVIL ACTION NO. H-98-1954 JURY**
Plaintiffs,	§	
VS.	§	
HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, ET AL.	§	
Defendants.	§	

PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO AMEND COMPLAINT

(Filed Dec. 22, 1998)

To the Court:

The Summit Plaintiffs, identified on the attached Schedule I, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, file this Motion for Leave to Amend Complaint and show as follows:

1. Plaintiffs filed their complaint on June 23, 1998. Plaintiffs moved for leave to file their First Amended Complaint on August 4, 1998 and leave was granted on August 11, 1998. Thereafter, this Court entered a scheduling order directing that all further amendments to pleadings be filed by September 15, 1999.

2. Plaintiffs move for leave to amend their complaint for a number of reasons. First, Plaintiffs desire to clean up some of the language and remove parties which

have no relation to this case. In their Complaint, Plaintiffs identified several entities involved in the manufacturing, distribution or marketing of polybutylene which were not made parties to this lawsuit by either the Plaintiffs or the Defendants as of this date. Instead of inundating the pleadings with names of entities which do not need to be identified, Plaintiffs have dropped several of the named entities and substituted the word "others" when necessary to show the extent of the conspiracy.

3. Second, Plaintiffs needed to amend the sections claiming fraud and fraudulent concealment to show that Plaintiffs were the direct victims of Defendants' fraud and RICO violations. Instead of purchasing completed properties which were operational at the time of the sale, as is the case for most of the *Villager* plaintiffs, the Summit Plaintiffs developed the properties and continued to own and operate them from the date that Plaintiffs built them. As identified in the Second Amended Complaint, Plaintiffs made the decisions to incorporate polybutylene plumbing systems into their projects on the basis of direct representations, which, unknown to Plaintiffs, were false.

4. Third, Plaintiffs also filed a Statement of Facts Supporting Their RICO Claims, (the "RICO Statement"). Plaintiffs do not intend, unless the Court so orders, to amend their RICO Statement. In fact, it is not required that Plaintiffs file such a RICO Statement as was previously required. The RICO Statement still accurately describes the factual basis for the Defendants' liability and it is incorporated by reference into the Second Amended Complaint. The only change would be to state more explicitly, if that is necessary, that Household International, Inc. is charged as a principal under § 1962(c).

Plaintiffs believe that they adequately charged Household as a principal in the RICO Statement, however, this change makes it clear and unequivocal. Thus, it should be unnecessary to republish the lengthy RICO Statement only to make this one new assertion.

5. Leave to amend should be freely given when justice so requires. Fed. R. Civ. P. 15. Justice requires this amendment because the Second Amended Complaint, attached hereto as Exhibit "B", more accurately represents the facts that will be proved on trial.

Thus, Plaintiffs pray that this Court grant its Motion for Leave to File Amended Complaint, that the Court deem such Second Amended Complaint filed as of the date of the Court's order, and for such other and further relief to which Plaintiffs are duly and justly entitled.

Respectfully submitted,

/s/ Barry L. Racusin/by [Illegible]
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CERTIFICATE OF CONFERENCE

On December 17, 1998, I sent this Motion via facsimile, attached hereto as Exhibit "A", to all counsel of record asking them to fax or phone me by Monday, December 21, 1998, if any person had an objection to this Motion. No party contacted me about this Motion and is thus unopposed.

/s/ David D. Ritter
David D. Ritter

CERTIFICATE OF SERVICE

This instrument has been served by certified mail, return receipt requested, on all persons on the service list on this the 22nd day of December 1998.

/s/ David D. Ritter
DAVID D. RITTER

SERVICE LIST

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Vanguard Plastics, Inc.
CMRRR: 916731

SCHEDULE I

1. Summit Properties, Inc.
2. Summit Properties, L.P.
3. Summit Properties Partnership, L.P.
4. Stony Point/Summit, L.P.
5. McGregor/McGuire, L.P.
6. Henderson/McGuire Partners, L.P.
7. Oak Ridge/McGuire Partner, L.P.
8. Waverly Place Summit Partners, L.P.

EXHIBIT

"A"

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December 17, 1998

TIME: 3:15 p.m.

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OUR FILE/REFERENCE: Summit Properties

TOTAL NUMBER OF PAGES TRANSMITTED (INCLUDING THIS PAGE): 4

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FAX MACHINE MODEL: LANIER 4500

If you have any problems with the transmission or receipt of this facsimile, please contact *Nancy* at (713) 626-1450 immediately. Thank you.

COMMENTS: **Enclosed is Plaintiffs' Motion for Leave to Amend Complaint. We would like this motion to be filed unopposed. If any of you are opposed, please let us know by facsimile or telephone by Monday, December 21. We intend to file this Motion on Tuesday. Thanks. David**

*** BROADCAST REPORT ***

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PAGE 1

No.	START TIME	MODE	LOCATION	STORE PAGE	TX PAGE	TOTAL TIME	CODE
1	12/17 16:01	TX	2220843	4	4	01'40"	OK
2	12/17 16:03	TX	7570178	4	4	01'10"	OK
3	12/17 16:04	TX	6279395	4	4	01'10"	OK
4	12/17 16:06	TX	6155265	4	4	01'42"	OK
5	12/17 16:08	TX	6557727	4	4	01'12"	OK
6	12/17 16:10	TX	9932308	4	4	01'28"	OK

EXHIBIT

"B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., SUMMIT PROPERTIES, L.P., SUMMIT PROPERTIES PARTNERSHIP, L.P., STONY POINT/SUMMIT, L.P., MCGREGOR/MCGUIRE, L.P., HENDERSON/MCGUIRE PARTNERS, L.P., OAK RIDGE/MCGUIRE PARTNERS, L.P., AND WAVERLY PLACE/SUMMIT PARTNERS, L.P.,	§	CIVIL ACTION NO. H-98-1954 JURY
Plaintiffs,	§	
VS.	§	
HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, HOECHST CORPORATION, E.I. DuPONT DE NEMOURS & CO., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, VANGUARD PLASTICS, INC., BOW INDUSTRIAL CORPORATION and HOUSEHOLD INTERNATIONAL, INC.	§	
Defendants.	§	

PLAINTIFFS' SECOND AMENDED COMPLAINT

To the Court:

Plaintiffs, SUMMIT PROPERTIES, INC., SUMMIT PROPERTIES, L.P., SUMMIT PROPERTIES PARTNERSHIP, L.P., STONY POINT/SUMMIT, L.P., MCGREGOR/MCGUIRE, L.P., HENDERSON/MCGUIRE PARTNERS, L.P., OAK RIDGE/MCGUIRE PARTNERS, L.P., AND WAVERLY PLACE/SUMMIT PARTNERS, L.P., bring this Second Amended Complaint complaining of and against HOECHST/CELANESE CORPORATION f/k/a CELANESE CORPORATION, ("CELANESE"), HOECHST CORPORATION, ("HOECHST"), E.I. DuPONT DE NEMOURS & CO., ("DuPONT"), SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, ("SHELL"), VANGUARD PLASTICS, INC., a Kansas Corporation, ("VANGUARD"), BOW INDUSTRIAL CORPORATION, ("BOW"), and HOUSEHOLD INTERNATIONAL, INC., ("HOUSEHOLD"), (collectively "Defendants"), and shows as follows:

I.

Plaintiffs

1 Plaintiff SUMMIT PROPERTIES PARTNERSHIP, L.P., a Delaware Limited Partnership, ("Summit"), is the owner and/or operator of several residential apartments, institutional residences or other multi-unit dwellings, throughout the country. The properties owned by Summit are Summit Beacon Ridge, Summit Blue Ash, Summit Breckenridge, Summit Charleston, Summit Fairview, Summit Glen, Summit Heron's Run, Summit Highland, Summit McIntosh, Summit Meadow, Summit Norcraft,

Summit Palm Lake, Summit Park, Summit Perico, Summit Square, Summit Village, Summit Walk, Summit Waterford, and Summit Windsor. Such properties are damaged as a result of the actions and products of Defendants.

2 Plaintiff STONY POINT/SUMMIT LIMITED PARTNERSHIP, a Virginia Limited Partnership, ("Stony Point"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Summit Stony Point, which is damaged as a result of the actions and products of Defendants.

3 Plaintiff McGREGOR/McGUIRE LIMITED PARTNERSHIP, a Florida Limited Partnership, ("McGregor"), is the owner and/or operator of a residential apartment known as Summit Gateway, which is damaged as a result of the actions and products of Defendants.

4 Plaintiff HENDERSON/McGUIRE PARTNERS, LIMITED PARTNERSHIP, a Delaware Limited Partnership, ("Henderson"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Summit Pike Creek, which is damaged as a result of the actions and products of Defendants.

5 Plaintiff OAK RIDGE/McGUIRE PARTNERS, LIMITED PARTNERSHIP, a North Carolina Limited Partnership, ("Oak Ridge"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Oak Ridge at Pelham Apartments, which is damaged as a result of the actions and products of Defendants.

6 Plaintiff WAVERLY PLACE SUMMIT PARTNERS, LIMITED PARTNERSHIP, a North Carolina Limited Partnership, ("Waverly"), is the owner and/or operator of a residential apartment, institutional residence or other multi-unit dwelling, known as Waverly Place, which is damaged as a result of the actions and products of Defendants.

II.

Defendant Parties

7 CELANESE is a Delaware corporation authorized to do and is doing business in Texas. CELANESE manufactured and sold raw materials, known as "Celcon", from which plastic acetal insert fittings were manufactured and used in polybutylene ("PB") plastics plumbing systems. The exercise of jurisdiction by Texas courts over CELANESE, by reason of the extent to which CELANESE is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice. CELANESE has been served and has appeared in this action.

8 HOECHST is a Delaware Corporation, authorized to do and doing business in Texas. HOECHST is the parent company of CELANESE. The exercise of jurisdiction by Texas courts over HOECHST, by reason of the extent to which HOECHST is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice.

HOECHST has been served and has appeared in this action.

9 DuPONT is a Delaware corporation authorized to do and doing business in Texas. DuPONT manufactured and sold raw materials, known as "Delrin," from which plastic acetal insert fittings were manufactured and used in PB plastic plumbing systems. The exercise of jurisdiction by Texas courts over DuPONT, by reason of the extent to which DuPONT is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend tradition [sic] notions of fair play and substantial justice, DuPONT has been served and has appeared in this action.

10 SHELL[1] is a Delaware Corporation with its headquarters and principal place of business in Houston, Texas, SHELL manufactures and sells the raw materials used to make PB plastic pipes for PB plumbing systems, SHELL had a monopoly on the sale of such raw materials in the United States and was the driving force behind the nationwide promotion and marketing of PB plastic plumbing systems. The exercise of jurisdiction by Texas courts over SHELL, by reason of the extent to which SHELL is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice. SHELL has been served and has appeared in this action.

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[1] Shell Chemical Company is a division of Shell Oil Company.

11 VANGUARD is a Kansas corporation not authorized to do business in Texas but nonetheless doing business in Texas and failing to maintain a registered agent in Texas for service. VANGUARD manufactures and sells PB plumbing systems throughout the United States and actively participated with SHELL, U.S. Brass Corporation, and others in the nationwide promotion and marketing of PB plastic plumbing systems. The exercise of jurisdiction by Texas courts over VANGUARD, by reason of the extent to which Vanguard is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair play and substantial justice. VANGUARD has been served and has appeared in this action.

12 BOW is a foreign corporation authorized to do and doing business in Texas. BOW was involved in the Houston-based polybutylene plumbing system conspiracy. As a co-conspirator, BOW is responsible and liable for the acts of its co-conspirators which occurred in Texas and which BOW knew or should have known would occur in Texas. BOW sold its product nation-wide and its product has become a permanent fixture upon Texas soil. The exercise of jurisdiction by Texas courts over BOW, by reason of the extent to which BOW is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contracts with Texas, would not offend traditional notions of fair play and substantial justice. BOW has been served and has appeared in this action.

13 HOUSEHOLD is a Delaware corporation authorized to do and doing business in Texas. The exercise of

jurisdiction by Texas courts over HOUSEHOLD, by reason of the extent to which HOUSEHOLD is, and was at all times material hereto, doing business in Texas, as well as by recent and sufficient contacts with Texas, would not offend traditional notions of fair pay [sic] and substantial justice. HOUSEHOLD has been served and has appeared in this action. HOUSEHOLD's [sic] wholly owned a subsidiary corporation named Household Manufacturing, Inc., ("Household Manufacturing"), which wholly owned a subsidiary named U.S. Brass Corporation, ("Brass"). HOUSEHOLD spun off Household Manufacturing in 1989, which became Eljer Manufacturing, Inc., ("Eljer Manufacturing"), and became the wholly-owned subsidiary of another HOUSEHOLD spin-off corporation, Eljer Industries, Inc, ("Eljer"). In 1994, Brass filed for Chapter 11 bankruptcy protection. The injunction issued in the case protected Brass, Eljer Manufacturing and Eljer from claims based upon polybutylene plumbing systems.

III.

Jurisdiction

14 Jurisdiction is based upon 28 U.S.C. § 1331 in that this action arises under Civil RICO, or 18 U.S.C. § 1961 *et seq.*

IV.

Venue

15 Venue is proper in Houston, Texas, pursuant to 28 U.S.C. § 1404 because at least one Defendant is located in Houston, Texas and a substantial part of the causes of action accrued in Houston, Texas.

16 Venue is also proper under 18 U.S.C. § 1965(a) and (b) as to all Defendants.

V.

Statement of Facts

17 In this Complaint, whenever it is alleged that any of the Defendants did any act or thing, it is meant that such Defendants' officers, agents, servants, employees, attorneys or representatives did such act or thing and that, at the time such act or thing was done, it was done with the full expressed, implied, or apparent authorization or ratification of the Defendants or was done in the normal and routine course and scope of employment of the Defendants' officers, agents, servants, employees, attorneys or representatives.

18 Plaintiffs seek to recover damages caused by the faulty and defective PB plumbing systems and components installed on their property. Plaintiffs are property owners, associations, businesses, and/or partnerships who have suffered substantial damages as a result of the defective plumbing systems and their components.

A. The Polybutylene Plastic Plumbing System.

19 A hot and cold potable water plumbing system is one of the major systems installed in residential or commercial buildings. Beginning in the late 1970's, SHELL orchestrated and directed a massive effort to convince the plumbing and construction industry that PB plumbing

systems were suitable for use in residential and commercial buildings, and potable water service distribution systems were both superior to and less expensive than copper systems, which dominated the market and other alternatives.

20. The PB plumbing systems consist of pieces of plastic pipe, made from PB, which are joined together by fittings. The vast majority of the fittings are acetal plastic ("fittings"). Pursuant to the instructions or endorsements of the Defendants, the ends of the fittings are inserted into the pipe, crimp rings made of copper or aluminum are squeezed over the points of joint or between the fittings and the pipes, and the crimp rings are fixed into place over the union of pipe and fitting with a crimping tool. Defendants initiated, ratified and/or approved this method of connection and installation.

21 SHELL makes PB resins from which the PB pipes are manufactured. At all material times, SHELL has a total monopoly on the PB marked [sic] in the United States, PB plumbing systems cannot be made or marketed without the PB resin from SHELL. SHELL had total control over the PB market.

22 Polybutylene is a by-product of the oil refining process. By developing a profitable use for PB, oil companies, such as SHELL, would be able to sell excess by-product. SHELL purchased the PB business in the 1970's along with an exclusive 10-year right to sell the product in the U.S. SHELL sold PB resin pellets to pipe extruders including, VANGUARD, BOW, Brass and others who manufactured PB tubing from the pellets.

23 Some of the acetal for the PB plumbing systems were made from resin made and sold by CELANESE, and known as Celcon. The rest of the acetal plastic fittings were made from resin manufactured and sold by DuPONT under the name Delrin. CELANESE and DuPONT designed, engineered, produced, manufactured, marketed and promoted the acetal copolymer resin under the Trademark "Celcon" and "Delrin", respectively, particularly for use in the manufacture of fittings for PB plumbing systems.

24 CELANESE and DuPONT sold the competing acetal resins as a raw material for the fabrication of acetal fittings for plumbing systems, CELANESE selling its acetal resins to VANGUARD, Brass and others and DuPONT selling its acetal resin to VANGUARD and other. Acetal resins were molded into acetal insert fittings, valve stops, plugs, and other accessories to compliment the PB pipe and complete the plumbing system.

25 BOW, VANGUARD, Brass and others all manufactured and/or sold PB plumbing systems or component parts thereof.

26 Plast-a-Matic Corporation, ("Plast-a-Matic"), purchased Celcon resin from CELANESE and designed, engineered, produced and manufactured insert acetal fittings, including tees, elbows and couplings from the Celcon resin. Plast-a-Matic promoted and marketed its insert acetal fitting marked with "A/I" to Admiral Marine Products Company, ("Admiral"), VANGUARD and others. Likewise, Plast-a-Matic purchased PB from SHELL and designed, engineered, produced and manufactured PB pipe.

27 Admiral purchased insert acetal fittings, engineered and manufactured with the Celcon resin, from Plast-a-Matic and promoted, sold and marketed insert acetal fittings marked with "A/I" to VANGUARD and others.

28 Admiral and Plast-a-Matic operated as contract fitting manufacturers for VANGUARD and others, marketing Celcon insert fittings that were sold as components of the customer's PB plumbing systems. In addition, during the 1980's, VANGUARD began making its own Delrin fittings and began buying Celcon resin.

29 VANGUARD purchased Celcon resin from CELANESE and designed, engineered, produced and manufactured insert acetal fittings, including tees, elbows, couplings, et al., using Celcon resin. In addition, VANGUARD purchased and marketed insert acetal plumbing fittings from Admiral and Plast-a-Matic. VANGUARD promoted and marketed these insert acetal fittings under the trademarked "Safeguard" or "SG" to builders, developers, plumbing distributors and other buyers and users of plumbing parts. Likewise, VANGUARD purchased PB from SHELL and designed, engineered, produced and manufactured PB ipe.

30 VANGUARD manufactured PB pipe from resin supplied by SHELL and molded acetal fittings from the resin supplied by CELANESE and DuPONT. Under a marketing plan devised by SHELL in the late 1970's, SHELL, VANGUARD and others promoted and sold the complete PB plumbing systems. VANGUARD promoted and sold its product under the name Safeguard.

31 VANGUARD, BOW, Brass and others extruded the PB tubing from SHELL resins. VANGUARD, BOW, Brass and others developed PB systems composed of pipe made from PB and insert fittings made from Celcon or Delrin, fastened to the pipe by means of a metal crimp ring that is applied with a special crimp tool. The tubing was sold alone or as a component of complete PB plumbing systems. VANGUARD, Brass and others also manufactured acetal fittings and parts for their PB systems.

32 SHELL, CELANESE, DuPONT, VANGUARD, BOW, Brass, Admiral and Plast-a-Matic, among others, marketed PB pipe and systems including insert acetal fittings across the country to builders, developers, plumbing distributors and other buyers and users of plumbing parts. They made the representations which SHELL made in its marketing efforts and assisted SHELL in its marketing efforts. Among other things, they represented that a PB plumbing system would last the normal lifetime of a home or building in which it was installed; that the PB plumbing system could be correctly installed easily and inexpensively; that the plumbing system would not degrade or corrode; and that it had characteristics and benefits well in excess of any other plumbing system sold in America. All such representations were false.

33 Defendants conspired together to profit from the polybutylene plumbing systems. They contributed resources and money to associations created for the furtherance of the conspiracy. The conspiracy was based in Houston, Texas, where SHELL organized and implemented the plan of the conspiracy. The conspiracy produced a fraud on the market and upon the public.

34 Plaintiffs' commercial properties contained PB pipe and insert acetal fittings promoted, designed, engineered, produced, manufactured and sold by the Defendants. Plaintiffs have learned that the PB plumbing system failed or is failing. The systems and their components are degrading, cracking, leaking and spraying water, causing substantial damages to Plaintiffs and their properties. Some Plaintiffs have been forced to replace many of the insert acetal fittings and PB pipe and believe and anticipate that the need to replace any insert acetal fittings and pipe will be necessary in the future until the entire system is replaced. Plaintiffs have been forced to take the additional repair of the plumbing system, and cosmetic repair, if feasible, including but not limited to the repair and replacement of fittings, pipe and other components, sheetrock, exterior brick, wood, flooring, carpet and painting. Other items of personalty and/or business property have been damaged or destroyed. Plaintiffs' businesses have been damaged due to the property damage caused by the failing systems and its effect on Plaintiff's ability to run their businesses.

B. The Fraudulent Marketing of the Polybutylene System

35 SHELL established its monopoly position in the manufacture and sale of PB resin in the United States in 1977. SHELL achieved this monopoly position by buying the existing PB business of Witco Chemical and the patents for PB resin, and by obtaining exclusive right for ten

years to market PB resin in the United States. This position enabled the conspiracy to defraud the plumbing market.

36 SHELL's objective and its co-conspirators' joint enterprise was to create an enormous demand for PB pipe by causing it to become the material of choice instead of copper for residential and commercial plumbing and potable water service distributions systems and to achieve dominant position in that market before its ten year exclusive marketing right expired and competition could develop. From the beginning, SHELL's actions were driven by (1) its objective to become a dominant supplier of raw material for plumbing systems in the United States and ultimately worldwide, and (2) its monopoly to establish its market position in a short period of time in order to take advantage of the window of opportunity created by its ten year monopoly position.

37 SHELL, therefore, created the conspiracy by organizing and directing a massive marketing plan designed to accomplish its objectives. SHELL developed the advertising materials using the resources available within SHELL and hired outside advertising consultants. SHELL also concluded that the manufacturers' representatives would be critical in the marketing effort, and so SHELL enlisted the Defendants and others to participate in the joint marketing effort. SHELL developed advertisement brochures, manuals and guides for PB plumbing systems and provided them to the Defendants and others for dissemination through the United Stats. The representations contained in those marketing material [sic] originated with SHELL, DuPONT and CELANESE and were

spread through the construction and plumbing industries, in an effort to convince builders and plumbers to use PB plastic plumbing systems, and to convince building officials and code bodies to approve the use of such systems.

38 Plumbing materials may not be used in a particular geographic area unless they are approved and listed by the building code bodies having jurisdiction over that area. Therefore, SHELL and the Defendants had to gain and maintain the necessary building code body approvals for the PB plumbing system. SHELL and the Defendants believed that the building code bodies were the major impediment to their objective of displacing copper and becoming the dominant raw material supplier to the plumbing systems market in the United States. Promotion of the PB system to the building code bodies around the country was therefore a major focus of the marketing effort orchestrated by SHELL, and implemented jointly by the Defendants and others.

39 SHELL officials drafted proposals to include PB systems in building codes, prepared and presented to code bodies materials extolling the purported virtues of PB systems, and provided such materials to others, including the Defendants, for them to present to the code bodies. The same representations as to the characteristics of PB plumbing systems were made to the code bodies in order to gain their approval as were made to the construction and plumbing industries in the marketing of the systems once the approvals were gained.

40 SHELL's marketing effort was well organized and extensive. In addition to saturation of the industry with material relating to PB systems and the focus on the

code bodies, the official marketing plan included extensive use of the media, the use of SHELL sales personnel in sales blitzes in major metropolitan areas, and the publication by SHELL (with the support and cooperation of the Defendants) of a magazine (Polybutylene Piper) dedicated solely to the promotion of PB.

41 SHELL also caused the formation of an industry trade group, the Polybutylene Committee of the Plastic Pipe and Fittings Association (PPFA), the purposes of which was to promote and protect the interests of producers of PB products. SHELL and the other Defendants were members of the PPFA Polybutylene Committee, and through that vehicle as well as others, they met on a regular basis, exchanged information, contributed funds, and jointly promoted PB plumbing systems.

42 The basic marketing pitch developed by SHELL and repeated through the country by SHELL, the Defendants and others was that the PB plastic plumbing system had characteristics that made it superior to copper systems and other alternatives. Among other things, Defendants represented:

a. The system is suitable for use as a hot and cold potable water plumbing system;

b. The system will last at least 50 years;

c. The system will not corrode and even the most aggressive water will not attack it;

d. The joining systems are easy, reliable, simple, proven and fast;

e. Service problems with the system have been virtually nil.

43 All of these representations were false. Defendants knew, or should have known, that the PB system suffered from inherent defects that rendered it wholly unsuitable for use as a hot and cold water plumbing system or in potable water service distribution systems. Far from being suitable for potable water plumbing systems and immune from corrosion and attack by water, PB systems in fact are attacked by chlorine, a substance routinely present in potable water supplies in the United States. PB plumbing systems degrade in chlorinated water, become brittle and fail prematurely. Hot water at temperatures common in residential and commercial water supplies and stress at levels common to the PB plumbing systems and in potable water service distribution systems compound the problem, and cause an acceleration of the degradation that leads to failure.

44 In addition, the representation that "joining methods are easy, simple and reliable" was false. The Defendants promoted and ratified the "crimp ring" method of connecting the pipe to the fittings. The Defendants advertised a method where in order to avoid over crimping or under crimping a joint, the crimp ring must be compressed within extremely minute tolerances which the Defendants knew were unrealistic and were not being achieved by the crimping tools distributed by Defendants. Furthermore, the Defendants' instructions to plumbers failed to disclose the minute tolerances within which the joints had to be crimped and created the false impression that the system was fast and easy to install and could be installed with little, if any, special training.

45 The representation that the system would last 50 years was also false. Defendants knew, or should have

known, that the claim was false and that there was no reasonable basis for such a claim.

46 The representation that service problems with the system were virtually nil was also false. In fact, there were extensive failures, a fact which Defendants knew or should have known.

47 Defendants were fully aware of the inherent defects in the PB plumbing system, and intentionally did not disclose that information to the industry, consumers, or code approval officials. Instead, they agreed among themselves not to disclose such information, and took affirmative step to prevent their knowledge of the defects in the system from becoming public. Defendants kept the potential and actual problems with the system secret because they knew that if this information became public it would prevent the penetration of PB plumbing systems into the marketplace, and would preclude the eventual dominance of that market which they sought.

48 Internal tests and studies as well as field failures alerted Defendants to the inherent defects of the system from the beginning. Nonetheless, they continued to promote and sell the systems, representing them to be suitable for residential and commercial plumbing and in potable water service distribution systems, and concealing the problems their own internal tests and studies had alerted them to, including the failure of the PB system to perform its stated function.

49 Time and time again, Defendants discussed the problem internally and among themselves. Suggestions that were made to advise the public of tests that had been conducted and showed the potential problems were

rejected, and the test data was instead kept secret. Defendants knew that knowledge of the chlorine effect and the other inherent defects with the system and its components would be a cause for concern by code bodies and governmental agencies, and so they intentionally concealed such information from the code bodies as well as potential customers.

50 The processes by which the failures occur are not immediate. They occur over a period of time, (a few months to a few years), as the various forces which inevitably cause the failures progressively cause the pipe and fittings to degrade and the system to fail mechanically. It was not long, however, before system failures began occurring as a result of the very problems Defendants had anticipated.

51 Defendants undertook to cover up the real reasons for these failures, blaming the failures on plumbers for alleged installation errors or users for allegedly improper uses. While CELANESE and SHELL held a secret meeting in Houston to discuss what they referred to as extensive field failures, Defendants simultaneously told code bodies that the problems were very limited. While Brass, CELANESE and SHELL discussed among themselves secretly that they had done nothing to attempt to determine whether improper installation was the primary cause of failures, Defendants simultaneously represented to code bodies that the failures that had occurred were due to improper installation. While publicly blaming plumbers for fault installation, Defendants concealed the information they had which showed the plumbers were not responsible.

52 Despite knowledge of the defects and extensive failures, Defendants continued to represent the system and its component parts as well proven, reliable, easy to install, and suitable for potable hot and cold water systems and in potable water services distribution systems. These representations were false.

53 As set forth above, the weakest link in the system was the means by which the tubing was joined. Ultimately, the failure rate of the system at the plastic insert fittings became so great that the use of the acetal plastic insert fittings for site built construction was allegedly discontinued in late 1986 or early 1987, although many of Plaintiffs' properties were built after 1987. Even then, while SHELL's internal study concluded that acetal plastic insert fittings contained inherent problems, Defendants' public posture was that there were not problems with acetal plastic insert fittings and the change to metal insert fittings was simply to upgrade the system.

54 SHELL and VANGUARD continue, or until just recently continued, to market PB plumbing systems despite the massive failures and the knowledge that such systems are unsuitable as a hot and cold potable water plumbing system in potable water service distribution systems. These Defendants know that the plastic insert fitting is not the only problem with the systems, but instead is just the weakest link and, therefore, is the point of first failure. They know that the same defect exists in the pipe, it simply takes longer for the pipe to degrade and fail than it does for the plastic fittings. In fact, pipe failures are occurring in growing numbers. Defendants

further know of mechanical defects inherent in the joining systems that utilize metal insert fittings that render these systems defective and unsuitable.

55 The PB systems joint assembly fails due to several mechanical factors, including stress relaxation, differing co-efficients of thermal expansion, and failure to manufacture the components within the specifications that the system requires, among other things.

56 SHELL's Polybutylene Department and the SHELL executives who devised and implemented the nationwide marketing scheme for PB plumbing systems and who made SHELL's decision regarding PB are at all times have been located in Houston, Harris County, Texas.

57 As a result of Defendants' conduct set forth above, Plaintiffs own PB plumbing systems which are inherently defective and have already prematurely failed or will do so.

58 Defendants knew that chlorinated water and other chemicals in regular drinking water caused acetal fittings to crack and degrade. Defendants were well aware of the acetal-chlorine problem with fittings made from Celcon or Delrin. In addition, CELANESE and DuPONT knew that Celcon and Delrin should not be used in an environment where it would be exposed to chlorine in any amount due to the negative impact of chlorine on the material, and that hot water applications were particularly dangerous due to the catalytic effects of high temperatures. CELANESE and DuPONT represented to the public that their respective acetal resins were (1) suitable for use in water systems. (2) reliable and would

have a long life when used in plumbing systems, and (3) a fit and proper material for use as plumbing insert fittings. CELANESE and DuPONT failed to disclose to the public that Celcon and Delrin would degrade or corrode and ultimately fail when exposed to the chemicals it knew existed in ordinary drinking water. Even after receiving reports of fitting failures, CELANESE and DuPONT continued to represent that Celcon and Delrin material were suitable for their intended use in plumbing systems. The other Defendants also had this knowledge and made these claims and representations while marketing the PB plumbing systems. Notwithstanding the abundance of information to the contrary, CELANESE and DuPONT and other defendants, marketed Celcon and Delrin as an ideal plumbing-grade material.

59 SHELL and the other Defendants knew that the PB tubing would fail due to notch sensitivity, chlorine degradation, or oxidation. SHELL and the other Defendants refused to deal with these problems as a means of preventing public disclosure of the problem. Instead, they conspired with each other to conceal these facts from the code bodies, builders, and plumbers so that Defendants could capture and dominate the plumbing market in the United States.

60 Plaintiffs own and operate residential apartment buildings and other multi-unit commercial dwellings throughout the country. To secure new tenants and maintain the loyalty of existing tenants, Plaintiffs provide, or at least attempt to provide, clean, comfortable, safe and attractive living units. As business owners, Plaintiffs rely heavily upon the quality apartments, institutional residences and other multi-unit dwellings they operate and

the good reputation they have worked hard to establish. The Defendants have severly damaged Plaintiffs' businesses, by providing faulty PB plumbing systems. Plaintiffs' buildings quality and reputations have been severely damaged by the faulty PB plumbing systems incorporated in their apartments, institutional residences and other multi-unit dwellings. All Plaintiffs have suffered damages as a result of the Defendants' conduct and seek to recover their damages from Defendants.

VI.

Negligence

61 Defendants violated their duty to exercise the ordinary care and diligence exercised by a reasonable and prudent designer, manufacturer and seller under the same or similar circumstances, and were negligent in the following particulars: (a) recommending or specifying Celcon, Delrin or PB for use in plumbing systems of the type installed in Plaintiffs' buildings; (b) failing to give warning or adequate warnings regarding the limitations of use of PB, Celcon, or Delrin in plumbing systems; (c) failing to adequately inspect or test the PB plumbing system, the PB tubing, the acetal fittings or the components and materials thereof; (d) failing to give warnings or adequate warnings regarding the limitation of use of the PB plumbing system, the PB tubing, the acetal fittings or component parts and materials thereof; and (e) representing that the PB plumbing systems, PB tubing, acetal fittings or their component parts and material would be suitable for use in building such as those owned and franchised by Plaintiffs. Each of the acts and omissions

alleged herein, taken separately and collectively, constitutes a direct and proximate cause of Plaintiffs' damages.

62 Defendants made statements which they knew, or should have known, were false and untrue through exercise of due care and diligence. Further, Defendants were negligent because they (1) failed to ascertain the truth of [sic] falsity of their statements concerning the quality, uses, characteristics, and benefits of the PB plumbing systems, PB Delrin or Celcon, or (2) made statements recklessly, without any knowledge of the truth, as positive assertions of fact. Defendants knew or should have known that their statements were false, incorrect or misleading. Defendants' conduct is a proximate cause of Plaintiffs' damages.

VII.

Gross Negligence

63 Plaintiffs would further show that the conduct of the Defendants constitutes "gross negligence," as that term is understood in law. Defendants knew that the PB plumbing systems, PB, Delrin or Celcon would be installed and were promoted as suitable to be installed in buildings of the type owned and franchised by Plaintiffs. Defendants, knew or should have known, that the use of these systems, component products or chemicals would result in serious damage. Nevertheless, Defendants willfully failed to take steps to avoid the probability of injury or damage. Defendants acted in conscious disregard of the rights of Plaintiffs and other consumers and knew, or

should have known, of the probable serious consequences of their conduct. Defendants were grossly negligent, reckless, and consciously indifferent. Defendants' reckless and conscious indifference to the rights of the Plaintiffs entitles Plaintiffs to exemplary and punitive damages. Plaintiffs therefore sue for exemplary and punitive damages as provided by law.

VIII.

Strict Liability

64 Defendants designed, manufactures, assembled, promoted, marketed, sold, or otherwise introduced PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin into the stream of commerce. At all relevant times, Defendants were in the business of designing, assembling, manufacturing, testing, inspecting, marketing or selling PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin. The PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin were defective when they left each Defendant's possession, and continue to be defective in those buildings where the plumbing system and other defective components has not yet been replaced. The Defendants knew, or should have known, that the PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin were defective and would fail prematurely. The PB plumbing systems and their component parts and materials reached the ultimate users, including Plaintiffs herein, in substantially the same condition in which the Defendants sold them or in which they were expected to reach the ultimate user.

65 By introducing the PB plumbing systems and their component parts and materials into the stream of commerce, the Defendants represented that these goods were safe and suitable for their foreseeable uses. Plaintiffs utilized PB plumbing systems and their component parts and materials in a foreseeable manner and relied upon Defendants' skill and judgment to Plaintiffs' damage.

66 The PB plumbing systems and their component parts and materials were defective, unreasonably dangerous, and not suitable nor reasonably fit for their foreseeable use because the plumbing systems leak, disintegrate and fail due to (I) improper material selection for the pipe, (ii) improper material selection for the known design configuration of the fittings, (iii) improper material for the known application, (iv) improper design of the fittings and pipe, and (v) inadequate instructions or warnings on the limitations of use and performance when the PB plumbing system and its component parts and materials are used in a water system.

67 The PB plumbing system and its component parts and materials were inherently defective and were certain to cause Plaintiffs' damages despite Plaintiffs' reasonably foreseeable use or other uses contemplated by Defendants. The PB plumbing systems and their component parts and materials were a producing cause of Plaintiffs' damages. As a direct and proximate result of the Defendants' conduct. Plaintiffs and other consumers have suffered and will continue to suffer serious damage. Therefore, Defendants are liable under the doctrine of strict liability.

68 Defendants were at all material times herein engaged in the business of selling PB plumbing systems or their component parts or materials, and advertised or promoted the systems or their component parts and materials by making misrepresentations of material fact concerning their character and quality, such misrepresentations being a proximate cause of Plaintiffs' damages. Therefore, Defendants are liable under the doctrine of strict liability.

69 Defendants knew that the PB plumbing systems and their component parts and materials would be installed and were promoted as suitable to be installed in building such as those owned and franchised by Plaintiffs. Defendants knew, or should have known, that the use of such systems, parts or materials would result in serious damage, but willfully failed to take steps to avoid the probability of serious damage. Defendants acted in conscious disregard of the rights of Plaintiffs and other consumers. Defendants knew, or should have know [sic], of the probable serious consequences of its conduct. Accordingly, Plaintiffs are entitled to, and hereby seek, punitive damages against defendants.

IX.

Fraud

70 Defendants made direct material representations to Plaintiffs on which Plaintiffs reasonably relied to their detriment. Some of the representations made concerned the quality of polybutylene and the PB plumbing systems. Many of the representations were made by representatives or agents of the Defendants. The Summit

Plaintiffs, when constructing their projects, authorized the development managers of each of the projects to make construction decisions, including decisions about the plumbing, in conjunction with the general contractor for each of the projects. Representatives of the Defendants provided the development managers and general contractors of each of the projects with information and representations concerning the quality, durability and resilience of polybutylene plumbing systems. Such representaions [sic] were false. Some of the representations are also found in a document entitled "PB Industry Responds to 60 Minutes," drafted in 1991 by the Defendants and others in the PB industry and received by Plaintiffs. In the document, the Defendants made reference to "Misinformation from CBS," "The Story CBS Missed," and letters from various companies to Mr. Ed Bradley and CBS complaining that the 60 Minutes program was one-sided and biased against the Defendants. Importantly, Defendants emphasized that CBS only told the story of the past problems in the 1980's, and that such problems had since been solved to the complaining parties satisfaction. The Defendants emphasized that the past problems were solved and that the PB plumbing systems currently on the market did not have the problems that the 60 Minutes program addressed. Defendants representations in this regard were false. Plaintiffs relied upon these representations, and upon other representations made by the sales representatives of Defendants in deciding to install polybutylene in their projects. In addition, Plaintiffs also relied upon representations made to continue the use of polybutylene plumbing systems in their buildings.

Plaintiffs were harmed by the misrepresentations made by Defendants.

71 In addition, Defendants made numerous material misrepresentations to administrative agencies, builders, plumbers, trade associations, governmental entities, and customers, both orally and in writing, concerning the suitability PB plumbing systems and their component parts, PB tubing, acetal fittings, PB, Celcon or Delrin. Either the Defendants knew these material representations were false when made, or they made the misrepresentations recklessly, without knowledge of the truth, and as positive assertions.

72 Further, Defendants, directly and indirectly, made material misrepresentations or failed to disclose material facts to administrative agencies, builders, plumbers, trade associations, governmental entities, and customers regarding problems associated with PB plumbing systems, PB tubing, acetal fittings, PB, Celcon or Delrin. Defendants made material misrepresentations and omissions while expressing the alleged advantages and suitability of PB plumbing systems, parts, or materials to these entities. Defendants misrepresented fact [sic] that they knew were false and failed to disclose their knowledge of the problems and defects of PB plumbing systems or their parts or materials with the intention of depriving Plaintiffs and other consumers of property or legal rights and otherwise causing injury.

73 Defendants intended, expected or could have reasonably foreseen that code bodies, builders and the plumbing industry would rely on the misrepresentations or omissions made to them, but nevertheless engaged in

such conduct in order to defraud the market. Defendants' conduct proximately caused Plaintiffs' damages more fully described below.

74 Defendants' actions were intentional and reflect their knowing disregard for the rights of Plaintiffs. Therefore, Plaintiffs are entitled to and seek punitive damages.

X.

Civil Conspiracy

75 In addition to all of the above-described misconduct by Defendants, they also engaged in a civil conspiracy, under which they set out to capture the residential and commercial cold-and-hot water plumbing market through unlawful means. As described above, all of the Defendants knowingly and intentionally misrepresented the quality, the character and the capability of PB plumbing systems to code bodies, builders, and the plumbing industry throughout the United States from 1978 to present with the intention of those entities to rely upon their misrepresentations and with the intention of selling such systems to builders and plumbers for placement in Plaintiffs' dwellings and businesses. In doing that, Defendants perpetrated a fraud on the market, and in doing so, Defendants acted in conspiracy with each other. That conspiracy by all of the Defendants proximately caused Plaintiffs' damages described below, and because the conspiracy was intentionally and maliciously carried out, Plaintiffs' are entitled to exemplary damages as well.

76 The Defendants also conspired with one another for the common purpose of defrauding Plaintiffs and

other consumers through the sale and promotion of PB plumbing systems. While marketing PB plumbing systems, or components thereof, the Defendants knowingly and purposely committed one or more concerted acts to defraud the Plaintiffs. As an example, the Defendants failed to disclose the problems associated with PB plumbing systems, PB tubing, acetal fittings, PB Celcon or Delrin, and they made affirmative and false representations regarding the suitability of PB plumbing systems or component parts and materials thereof for use in buildings. By these and other acts, the Defendants intended to defraud Plaintiffs and other consumers, and each Defendants [sic] was aware or understood that the other had such purpose.

77 The Defendants knew that the PB plumbing systems would be installed and were promoted as suitable to be installed in the attics and behind the walls of buildings. The Defendants knew, or should have known, that the use of such systems would result in serious damage, but nevertheless willfully failed to take steps to avoid the probability of serious damage, consciously disregarding of the rights of Plaintiffs and other consumers. The Defendants knew, or should have known, of the probably serious consequences of their conduct and acted in a despicable, willful, wanton, malicious, reckless, and outrageous manner.

78 As a proximate result of such actions in furtherance of this conspiracy, Plaintiffs have been damaged and are entitled to recover from these Defendants, jointly and severally, all damages proximately resulting from the Defendants' wrongful conduct. The Defendants acted with tortious and conscious disregard of Plaintiffs' rights.

Further, the Defendants acted with tortious and conscious disregard of Plaintiffs' rights. Further, the Defendants acted in a wanton and malicious manner for the purpose of causing harm to the Plaintiffs, entitling Plaintiffs to punitive damages as a deterrent to similar behavior in the future.

XI.

Civil RICO

79 Defendants' conduct described above, and particularly that of SHELL, DELANESE, duPONT [sic], VANGUARD, HOUSEHOLD and non-party Brass, violates the Federal Civil Racketeer Influenced Corrupt Organizations (RICO) Act, 18 U.S.C. §1961 *et seq.* Specifically, Defendants were all members of an enterprise engaged in interstate commerce, the purpose of which enterprise was to capture the residential and commercial hot-and-cold-water plumbing market. Furthermore, they conducted the affairs of their enterprise, the PB Enterprise, through a pattern of racketeering activity from 1978 up to 1995. Specifically, SHELL, CELANESE, duPONT [sic], VANGUARD, Brass and HOUSEHOLD, used the United States mails and interstate wires on tens of thousands of occasions to defraud code bodies, builders, developers, and plumbers throughout the United States into approving or purchasing their defective PB plumbing systems with the intent that such systems would be placed in the homes and businesses of Plaintiffs and millions of other Americans. Defendants accomplished that by sending false and misleading information to those code bodies and users in the U.S. mail and by interstate

wires. SHELL, CELANESE, Brass and HOUSEHOLD controlled and directed such enterprise in violation of §1964(a) and (c) of RICO. Furthermore, Defendants conspired with each other to control and direct the PB Enterprise in violation of §1964(d). Defendant SHELL created the enterprise in 1978 shortly after it acquired the polybutylene patent and business from Witco. Brass and CELANESE joined the enterprise shortly thereafter and both maintained an interest in the enterprise throughout the 1980's. HOUSEHOLD acquired Brass in 1981 and actively directed Brass as its subsidiary in its participation in the enterprise from 1981 through April 1989 when it divested itself of Brass because of the unlimited exposure of Brass to PB claimants. In doing so, HOUSEHOLD stripped Brass and its new parent company of $140 million, leaving that entity virtually insolvent, only to succumb to bankruptcy five years later because of the magnitude of PB claims. HOUSEHOLD violated Sections 1962 (a), (c) and (d). The Plaintiffs incorporate by reference their previously filed Statement of Facts Supporting Plaintiffs' RICO Claims, ("RICO Statement"), into this paragraph. Plaintiffs amend such RICO Statement only to explicitly allege that HOUSEHOLD is liable as a principal under § 1962(c).

80 These continuous violations of the Civil RICO Act by SHELL, CELANESE, duPONT [sic], VANGUARD, Brass and HOUSEHOLD from 1978 to the present proximately caused injury to Plaintiffs' properties and businesses as described below. Accordingly, Plaintiffs seek threefold their actual damages, plus costs of suit including a reasonable attorney's fees.

XII.

Discovery Rule, Fraudulent Concealment and Class Action Tolling

81 Defendants have plead limitations as an affirmative defense. Plaintiffs would show that the various statutes applicable herein were tolled by the discovery rule or by the fraudulent concealment of Defendants' wrongful conduct. Specifically, the discovery rule applies to the causes of action founded in Civil RICO and negligence and the fraudulent concealment rule applies to all causes of action. Defendants fraudulently concealed the problems of polybutylene plumbing system through their representations to Plaintiffs and through the document entitled "PB Industry Responds to 60 Minutes." Such representations are discussed above in the section entitled "Fraud". In addition, the Defendants' representatives, the Plumbing Claims Group and the Consumer Plumbing Recovery Center, represented to Plaintiffs that their plumbing systems would be timely replaced with quality materials. Such representations were false and Plaintiffs assert that such representations were simply a ruse to deceive Plaintiffs into foregoing their legal remedies until such time as the Plaintiffs were made part of the class actions and be compelled to accept the limited remedies of the class plaintiffs. In addition, some of the Defendants attempted to limit their liability through class actions of which Plaintiffs, until opting out, were putative members. During the time that Plaintiffs were putative members of the class actions and until they opted out, the statute of limitations was tolled as to Plaintiffs' claims against the class defendants. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974);

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983); *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1147 (5th Cir. 1998). Accordingly, none of Plaintiffs' claims are barred by limitations.

XIII.

Damages

82 Plaintiffs have suffered greatly as a result of Defendants' product and actions. Plaintiffs have already experienced premature failures with the PB plumbing systems, and anticipate that the failures will continue and will increase in frequency over time.

83 Plaintiffs' real and personal property have been severely damaged. As a result of the water damage, among other, the Plaintiffs' properties have experience the problems normally associated with pipe breaks and pipe leaks. The PB plumbing systems will have to be removed and replaced with proper systems for Plaintiffs to ever stop suffering repeated water leaks and the resulting additional damage caused by those leaks. Plaintiffs seek reimbursement for the reasonable value of services and materials required, including plumbing repair materials and supplies, to repair the damage suffered in the past and future as a result of the PB plumbing systems.

84 In addition to the cost of repair or replacement of the PB plumbing systems, Plaintiffs seek damages for the value of lost or destroyed personal property.

85 Plaintiffs additionally seek exemplary or punitive damages, and reasonable and necessary attorneys'

fees for the preparation and trial of this case through its final disposition after all appeals and collection efforts.

86 More specifically, Plaintiffs seek recovery for their losses and damages in the following categories:

a. Cost to repair and restore the buildings;

b. Value of services, supplies, and materials in making past and future repairs to the plumbing systems;

c. Cost to repair or replace the plumbing systems;

d. Value of lost or damaged real and personal property;

e. Expenses associated with moving, relocating or reimbursing tenants;

f. Exemplary and punitive damages;

g. Civil RICO damages;

h. Reasonable and necessary attorneys' fees;

i. Court Costs;

j. Pre-judgment and post-judgment interest; and

k. Such further relief as the Court deems just.

XIV.
JURY REQUEST

87 Plaintiffs have requested a trial by jury and the jury fee has been paid.

XV.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that the Defendants be cited to appear and answer this Petition; that Plaintiffs have judgment against the Defendants, jointly and severally, that Plaintiffs recover actual damages, plus pre-judgment and post-judgment interest, plus exemplary or punitive damages, plus other and additional damages as specified above, plus reasonable attorneys' fees and court costs; and that Plaintiffs have such other and further relief, in law and in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/ Barry L. Racusin/By [Illegible]
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CERTIFICATE OF SERVICE

This instrument has been served by certified mail, return receipt requested, on all persons on the service list on this the 22nd day of December 1998.

/s/ David D. Ritter
DAVID D. RITTER

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20622

SUMMIT PROPERTIES INC; SUMMIT PROPERTIES LP; SUMMIT PROPERTIES PARTNERSHIP LP; STONY POINT/SUMMIT LP; MCGREGOR/MCGUIRE LP; HENDERSON/MCGUIRE PARTNERS LP; OAK RIDGE/MCGUIRE PARTNERS LP; WAVERLY PLACE/ SUMMIT PARTNERS LP

Plaintiffs - Appellants

v.

HOECHST CELANESE CORPORATION, formerly known as Celanese Corporation; HOECHST CORPORATION; E I DUPONT DE NEMOURS, AND CO; SHELL OIL COMPANY, doing business as Shell Chemical Company; VANGUARD PLASTICS INC; BOW INDUSTRIAL CORP; HOUSEHOLD INTERNATIONAL INC

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 6/7/00, 5 Cir., ___, ___ F.3d ___)

(Filed Jul. 27, 2000)

Before HIGGINBOTHAM and PARKER, Circuit Judges, and WARD,* District Judge.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Chief Judge King and Judges Jones and Benavides did not participate in the consideration of the rehearing en banc.

REHG-6a

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*District Judge of the Eastern District of Texas, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SUMMIT PROPERTIES, INC., ET AL.	§	
Plaintiffs,	§	**CIVIL ACTION**
VS.	§	**NO.**
HOECHST-CELANESE CORPORATION f/k/a CELANESE CORPORATION, ET AL.	§	**H-98-1954 JURY**
Defendants.	§	

PLAINTIFFS' STATEMENT OF FACTS SUPPORTING THEIR CIVIL RICO CLAIMS UNDER 18 U.S.C. § 1961 *et seq.*

(Filed Aug. 04, 1998)

Respectfully submitted,

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* * *

PLAINTIFF'S EXHIBIT 1

[LOGO]

Shell Chemical Company
Interoffice Memorandum

FEBRUARY 6, 1981

FROM: A. H. SCHROER

TO: R. F. SCHIMBOR

SUBJECT: MARKETING PLAN – POLYBUTYLENE PLUMBING PIPE RESINS

As the sole supplier to the plumbing pipe resin market, it is in Shell's best interests that this market develop as rapidly as possible. Not only would this be financially advantageous, it would also be strategically key to firmly entrenching ourselves in this profitable end use market segment prior to the time competition develops.

At present, polybutylene plumbing systems are extensively used in the mobile home and recreational vehicle markets but only have a small share of the residential, do-it-youself (DIY) and light commercial plumbing markets. Extensive penetrations into these markets is plagued by

the need to obtain code approvals, increase customer awareness of the features and benefits of the products, and establish an extensive distribution network. Because our customers are, with one exception, small companies, we must take an active role in promoting polybutylene plumbing systems until our customers become strong enough to completely assume that responsibility. This memorandum characterizes the markets for polybutylene plumbing systems by market type (residential construction; mobile homes and recreational vehicles; and remodeling, do-it-yourself, and light commercial), by competitive piping materials, and by geographic regions and describes the channels of distribution traditionally used. In addition, it goes on to define our marketing policies and detail the sales objectives and tactics used to accomplish those objectives.

MARKET CHARACTERIZATION

Market Size and Competition

Total plumbing pipe market size in polybutylene equivalents was estimated at 68MM pounds per year (Table I). Polybutylene and steel had 4 percent of the market in 1979; CPVC, 6 percent, and copper, 86 percent. Approximately 78 percent of this demand is for pipe of diameters smaller than one-inch with the remainder 1-2 inches in diameter.

The bulk of the residential housing market is in the Sun Belt region (South and West in Table II). The remodeling and do-it-yourself (DIY) markets should be distributed across the country, roughly in proportion to the population. The sum then of the residential and

remodeling/DIY market demands is the total market demand (Table III). The demand is broken down by major metropolitan areas in Table IV.

The purchasers in the stick housing and the remodeling/DIY markets are the home builders and plumbing contractors. This market is extremely large – there are 100,000 homebuilders and 125,000 plumbing contractors.

Marketing Channels

Plumbing contractors purchase their supplies at plumbing wholesalers, building product marts, and even local hardware stores although the latter are relatively unimportant. The plumbing wholesalers and building product marts purchase the supplies from the manufacturer frequently utilizing the services of a manufacturer's representative.

Marketing Impediments

Codes constitute the major impediment to the sale of new products. There are numerous layers of codes that must be obtained – national, regional, state, and local codes must all be secured. The code bodies are almost invariably risk-adverse and are frequently influenced by their historical relationships with existing competitive products and labor union elements.

A labor-saving product such as polybutylene plumbing pipe will elicit strong opposition from labor unions. The opposition can take the form of anything from attempts to influence code bodies by logical argument to

outright sabotage of new installations and illegal influence.

MARKETING PLAN

Customers Policy

As previously stated, our current customers are, with one exception, small companies who have limited assets to employ in promoting new products. The present number of seven (see Table V) have adequate extrusion capacity to supply current market demand. It is our intention therefore to let market growth build the cash flow of these companies, strengthening them to the point that they can take over the marketing responsibility from Shall. Adding customers who do not bring enough resources and commitment to either expand the ultimate size of the market or significantly increase the rate of penetration of existing markets will only reduce the cash flow of all existing customers, thereby frustrating our objective of transferring the marketing responsibility to them.

However, if a potential customer did have the resources and commitment to expand the market size or significantly increase the rate of penetration, then we would be interested in adding him to the program. To make a significant impact on the plumbing system market, we feel that the potential customer must have:

(1) a dedication to quality control and the production of quality products

(2) a complete line of fittings and pipe. Since the fittings are a key element in the plumbing systems, they should be proven by subjecting them to a torture test, the exact details of which must be resolved in the first quarter of 1981, preferably with the assistance of an outside testing laboratory like Stevens Institute.

(3) a dedication to standing behind their products as manifested in a guarantee to cover all consequential damages caused by a failure of their system within the first ten years of use. In addition, the company must have the financial ability to make payments if they should arise.

(4) a detailed marketing plan and the requisite resources that would be employed to promote polybutylene plumbing systems. The marketing plan will be subjectively evaluated by Shell to make sure that it will accomplish its stated objectives.

(5) a good payment record

At present, Qest [sic] Products is by far our largest customer, consuming 60 percent of the plumbing pipe resin that we sell. With the additional financial and marketing resources that they have gained through their acquisition by Wallace Murray, they stand to increase their market share still further. Since the dominance of the polybutylene plumbing system market by one company is potentially disadvantageous to us, at least one other strong player should be developed. Among the present customers, Genova is the only one that could make that transition quickly. However, they have been wed to CPVC for 20 years and do not yet show any

indication that they intend to leav [sic] it. As a result, it is likely that an entirely new strong customer must be recruited. Whereas we are already aware of two companies that have the resources to make them strong promoters of polybutylene (Celanese and R. & G. Sloane), a study of all potential candidates should be made so that contingency plans can be developed to accomplish one objective.

Although we have had difficulty in attracting strong players in the past, the marketing successes that we will have during 1981 should convince the doubters that polybutylene plumbing systems are going to displace copper, galvanized, and CPVC. As that realization sinks in, we should have strong companies trying to join our plumbing pipe program. Some time however will be required for this to happen. To minimize the required time, we should begin laying the groundwork with companies that we know can help us if they choose to make the apprpriate [sic] commitment. Initially, this effort would involve planting and reinforcing the idea with Celanese, Genova, and R. & G. Sloane that polybutylene is really starting to go. The first phase would involve contacts at industry/trade association meetings like the PPFA. As interest at the companies begins to escalate, direct calls on the decision-makers in those companies would be made.

Fittings Policy

As the market development of polybutylene plumbing systems proceeds, new fittings systems will be developed. In principle, this is a very favorable development,

potentially enhancing the value and rate of market acceptance of polybutylene plumbing systems. In practice however, it is fraught with risk. There are innumerable ways that fittings systems can fail. Regardless of what caused the failure, it damages the image of polybutylene plumbing systems in the marketplace slowing their rate of penetration. Furthermore, if Shell has tacitly promoted the use of that fitting system, there may be some grounds for legal action against Shell.

To protect ourselves against the adverse consequences of being associated with an inferior fitting system, Shell should require that each manufacturer who wishes to have Shell jointly promote his product submit evidence that his fitting system has passed a standard torture test. This would be the same test referred to earlier under *Customer Policy*.

Fitting Related Activities

Any torture test program set up to evaluate current fittings systems will have to make allowances for the inadequacies of Celcon, the material used in over 99 percent of the current fittings system. Celcon is subject to hydrolysis in acidic solutions. Since acid can accumulate in continuously recycling systems, an alternative to the Celcon would reduce the risks of failures in the field. Efforts should be continued to develop a filled polybutylene that will have an adequate modulus and molding cycle to economically substitute for Celcon.

Developments are required in the socket fusion fitting system, particularly in sizes from one to two inches.

At present, insert fitting systems cannot be used in these sizes. This effectively forecloses the light commercial market from us, a market of 15MM pounds per year. To access that market, we intend to catalyze our customer's development of a full range of socket fusion fittings including transition joints for 1, 1-1/4, 1-1/2, and 2-inch pipe. Specifically, we have offered to purchase from Trojan up to $25,000 of the fittings which would then be made available to the industry (purchase would be contingent upon Shell's agreement on the efficacy of the fittings). This expenditure would partially compensate Trojan for the expense incurred in recoring molds. Availability of the fittings is expected by April.

At present, there is no ASTM standard on insert fittings. This has been a nagging problem at code hearings and represents a potential market difficulty as systems are intermingled as they inevitably will be. An ASTM committee has been formed to develop such a standard. Shell will be represented on that committee by WRC and by S. E. Pregun. Since work on the standard has just begun, it is extremely doubtful that any standard will issue in 1981.

Relationship to Manufacturer's Representatives

In the building products trade, wholesalers have proven to be ineffective in introducing new products. They do not have the resources or the inclination to provide the effort required to get code approvals and teach plumbers how to use the product. They will provide a means of getting the product to the marketplace but must have a market created for them.

Direct sales efforts on the part of the extruder and/or his manufacturer's representative are required to create the market. With our customer mix, the manufacturer's representative is the key selling agent that must be motivated.

The manufacturer's representative normally handles 6-10 lines of products for which markets have already been created and, accordingly, his selling efforts are directed toward wholesalers. For a new product like polybutylene, the manufacturer's representative must develop a market in order to get wholesalers stocking his product. Prior to that time, he must secure local code approvals to sell in that community. As a result of the level of effort required, the manufacturer's representative must devote a disproportionate amount of his time to the new product. The incentive, of course, for this effort is the potential financial gain reaped by displacing other products as well as potential carry-on sales opportunities for his other product lines. Even then there is still a degree of uncertainty that the product will be a success. This, in turn, leads to a reluctance on the part of manufacturer's representatives to invest the time and money to get a market moving when it could be a long time before they have a positive cash flow.

Legally, we must treat each of manufacturer's representatives in an area in an equal fashion. This does not mean that we must spend an equal amount of time with each of them, only that the same offer of assistance be made to each. We will work with those manufacturer's representatives who take us up on our offer of assistance making a commitment of their own time to our mutual goal.

Elements of the Marketing Plan

There are two interrelated segments of the plumbing market – the new construction market and the remodeling/DIY market could be pursued in tandem or sequentially, using the success in one segment to establish the use in the other. To maximize the impact, the latter course was selected, focusing on the residential construction market. Historically, the residential construction market has been the first step in gaining market acceptance. It is more concentrated and is more cost and performance oriented than the remodeling/DIY market. Moreover, success confers more credibility than could be obtained in the remodeling/DIY market.

The major limitations to the growth of polybutylene plumbing systems are (1) a lack of awareness of and credibility for the features and benefits of polybutylene plumbing systems, (2) a lack of code approvals, and (3) a lack of local product availability – all classical problems associated with introducing new products. The program described in the subsequent paragraphs addresses all these areas.

Our advertising and promotional programs are directed toward the key decision makers – the home builder and the plumbing contractor. The programs consist of media advertising, direct mail, collaterial [sic] advertising, trade show participation, and generation of literature and other sales aids. The media program is designed to not only increase awareness but also to build preference. (The media insertion schedule is shown in Table VI.) Where possible, regional buys have been made

to concentrate our advertising in the Sun Belt where the bulk of the new home construction takes place.

The direct mail program consists of a quarterly publication of the "Polybutylene Piper" newsletter and a single direct mail piece intended to prompt further interest. The Piper is sent to the top 5,000 builders in the United States (list purchased from *Professional Builder*), the top 5,000 contractors (list purchased from *Contractor*), influential building code officials and other individuals recommended by the sales force, and all persons who have sent in an inquiry for information. The Piper is designed to build credibility for polybutylene by showing that it is being successfully installed everywhere and to position polybutylene as a premium material that is being used to solve plumbing problems in houses of all price ranges.

Collateral advertising involves the placement of case histories in trade publications. It is our plan to place four such stories during 1981.

During 1981, Shell will participate in the NAHB trade show in January and the Multi Housing World show in March. In addition, portable display booths will be used in regional/state builder and contractor shows.

Basic trade literature will have to be generated to support our sales efforts. Key pieces of literature and the expected timing for them are shown in Table VII.

Product awareness and identification are also inhibited by polybutylene's name. Among home builders and plumbing contractors, polybutylene is a difficult word to pronounce. This decreases product identification in that

buying group. To remedy this shortcoming, a trade name will be selected for the pipe resin early in 1981. The name should be short, easy to pronounce, and incorporate features or benefits on the product.

All of the advertising done during 1981 and subsequent years will utilize the tradename. The reputation established for the tradename between now and 1986 when our exclusive patent rights expire can become a significant asset in maintaining our market position against emerging competition.

We must have credibility for the claims made in our advertising if we are to maximize the rate of market penetration. This will be the place at which the entrenched interest groups (unions and the copper and iron pipe institutes) will strike. To demonstrate that polybutylene plumbing systems perform well, we are targeting our sales efforts on major builders in the areas in which we have code approvals (see listing of top 100 builders, Table VIII). The major builders typically are the innovators in new construction techniques and, because of their scale of operation, thoroughly check out any new system before they commit to it. Ideally, success with major builders can be highlighted by either publication in a trade journal or in the "Piper." As an ancillary benefit, the effectiveness of the sales force will be maximized by working with the largest builders.

Lack of code approvals and local availability can be addressed by either Shell selling efforts or efforts of our customers and their manufacturer's representatives. Because the manufacturer's representatives are much

more numerous (a listing of current manufacturer's representatives is given in Table IX), activities directed to increasing their effectiveness and gaining a larger portion of their time will have a substantial multiplying effect on our own efforts. To improve the effectiveness of the manufacturer's representatives, a number of sales aids in addition to our literature will be developed, e.g., a voice over slide projection that can be used by the representative to sell polybutylene. In addition, the information that Shell has developed on the answers to the technical questions asked by plumbing code bodies, builders, and plumbing contractors needs to [sic] collated and then passed on to the representatives. To be most effective, this should be done in one day product education sessions conducted at each of our customers for all of their manufacturer's representatives. While all of the manufacturer's representatives are together, they should also be advised of the opportunity for polybutylene in other small diameter pipe markets, e.g., water service, underfloor heating, solar, fire sprinkler systems, hydronic heating, ground coupled heat pumps, well piping, and geothermal piping. This portion of the session would concentrate on informing them on how the product should be used and, just as importantly, how it should not be used. Improper application of polybutylene with attendent [sic] failures will damage our positions in the viable growing markets.

As with anyone, manufacturer's representatives are motivated by money. More money than we could reasonably allocate for use as an incentive is already available to the manufacturer's representatives in the form of their commissions – the commissions are roughly 10 percent or $10 per housing start. For this money to serve as an

incentive however, the manufacturer's representative must believe that he can get it and get it in a relatively short period of time. To make it happen quickly, we intend to use Shell sales personnel to assist the representative in intensive market developments or blitzes in major metropolitan areas. In addition to significantly shortening the time required to make a market into a positive cash generator, the intensive development activities significantly reduce the vulnerability associated with product malfunction very early in the development period and increase the efficiency of our sales force by allowing them to reach large numbers of potential buyers in single meetings. As successes begin to mount, polybutylene will gain credibility making future code and development efforts easier.

Further motivation can be generated through sales promotions. We are currently working with our advertising agency to define the type and probable effectiveness of promotional programs.

We have targeted code work during the first half of 1981 to concentrate on consolidating success in geographic areas where we are already active and branching out to highly attractive markets in other regions. A target list of code approvals for the first half of 1981 appears in Table X. Given the uncertainties associated with code approvals, this list must be considered a stretch target in which an approval rate over 75 percent would be considered good. At the same time, other approval opportunities should arise through our customers efforts or as one result of our advertising and could add to the results targeted in Table X.

The schedule of blitzes will follow from code work already done or currently progressing. A schedule of blitzes through the first half of 1981 is shown in Table XI. The schedule in the second half of 1981 will depend upon the code approvals obtained during the first half of 1981.

The blitzes only cover major metropolitan areas. Half of the housing starts in the United States lie outside of these areas. The towns are too small to justify individual calls by Shell salesmen. These methods will be used to spread the success in the major metropolitan areas to the small towns and rural areas: media advertising which has attracted substantial attention in 1981, more extensive use of the manufacturer's representative organization, and display with the plumbing pipe booth at regional/state builders and contractors conventions. The success in the major metropolitan areas will give polybutylene plumbing systems a credibility that will make it much easier to penetrate rural city codes and get local builders using polybutylene. A listing of the regional exhibitions currently scheduled appears in Table XII (more will be added through the year – target number of 12).

The quickest method of increasing the availability of polybutylene plumbing systems is to sign up large chains of plumbing outlets (a list of the major chains is shown in Table XIII). Unfortunately, almost all of these chains purchase centrally and thus are not interested in stocking a product until it begins to gain acceptance through a large portion of their territory. Sales to these chains must wait until the successes slated for the first half of 1981 are obtained. Target chain store accounts for the second half of 1981 are shown in Table XIV. Again, this table shows a stretch target.

With the experience with the "blitzes," we expect that polybutylene sales will exceed 80 percent of ultimate market penetration within four years. The average share during the first year after the blitz should range from 10-25 percent. Assuming reasonably normal building conditions, this means that the blitzes in the first half of 1981 should generate over 700,000 pounds of sales in the following year (contributions of over $300,000). Even greater sales volumes and contributions would be forthcoming in subsequent years.

Our current share of the domestic residential plumbing market is estimated at 3 percent. With the marketing efforts conducted during 1981, we expect to increase that penetration to 5.5 percent. If the projected number of houses are built in 1981, this penetration will result in sales of 1,200M pounds of PB4127. Adding in the mobile home and customer export markets will bring this total to 3,400M pounds. A breakdown of this volume by customer is given in Table XV.

Penetration of the remodeling/DIY market at maximum speed will reqire [sic] the development of a detailed marketing program for this market segment. This in turn will depend upon an analysis of the marketing distribution channels and buying motivation. A consultant study should be used to obtain this information.

Pricing Strategy

Polybutylene plumbing systems are much less expensive on an installed basis than metallic piping systems that occupy the bulk of the market. Compared to CPVC,

the pipe is 20 percent less expensive and polybutylene is easier to install.

Our current price is roughly at parity with that of CPVC and copper. As a result, there is room for our prices to be moved upward. In fact, we have already begun to increase real margins with the last price increase of November 1, 1980. It is proposed that we continue to increase real margins in a gradual fashion to a level in excess of a weighted reinvestment price (contribution from plumbing pipe resins double that of cold water resins and 2-1/2 times that of film resins). The total increase in real margin would be 30-40 percent (a price increase of roughly half as much). So as not to alienate our customers, the increase would be made in a series of roughly equal steps over the next five years. The STOP price for 1981 is 97.0 cpp for the plumbing grades versus the 1980 average price of 82.4 cpp and the current hopper car price of 91.0 cpp.

/s/ A.H. Schroer
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